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ORAL ARGUMENT NOT YET SCHEDULED

Nos. 02-1244, 02-1246, 02-1247, 02-1248, 02-1249 (consolidated petitions)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1244

BEETHOVEN.COM LLC, ET AL.,
Petitioners

v.

LIBRARIAN OF CONGRESS,
Respondent

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, ET AL.,
Intervenors.

ON PETITION FOR REVIEW OF THE JUNE 20, 2002 FINAL RULE AND ORDER OF THE LIBRARIAN OF CONGRESS CONCERNING THE DETERMINATION OF REASONABLE RATES AND TERMS FOR THE DIGITAL PERFORMANCE AND EPHEMERAL RECORDINGS OF SOUND RECORDINGS

FINAL BRIEF FOR CONSOLIDATED PARTICIPANT LICENSEE PETITIONERS SALEM COMMUNICATIONS CORP., THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE, AND LIVE365, INC.

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March 4, 2004

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies:

A. Parties and Amici

Proceeding Under Review. The parties that participated in the proceeding under review were as follows:

BET.com	Salem Communications Corp. ("Salem")
Comedy Central	National Religious Broadcasters Music License Committee ("the NRBMLC")
Echo Networks, Inc.	Susquehanna Radio Corp.
Listen.com	Clear Channel Communications Inc.
Live365, Inc. ("Live365")	Entercom Communications Corp.
MTVi Group LLC	Infinity Broadcasting Corp.
Myplay, Inc.	DMX/AEI Music Inc.
NetRadio Corp.	American Federation of Television and Radio Artists ("AFTRA")
Radio Active Media Partners, Inc.	American Federation of Musicians of the United States and Canada ("AFM")
RadioWave.com, Inc.	Association For Independent Music
Spinner Networks Inc.	Recording Industry Association of America, Inc. ("RIAA")
XACT Radio Network LLC	James H. Billington, Librarian of Congress

67 Fed. Reg. 45,240, 45,241. The following parties withdrew from the proceeding after its initiation:

Coollink Broadcast Network	Univision Online
Everstream, Inc.	Westwind Media.com, Inc.
Incanta, Inc.	National Public Radio
Launch Media, Inc.	Music Choice
MusicMatch, Inc.	

Id. at 45,241 n.3, 45,263.

Court of Appeals. The parties and amici before this Court in the consolidated cases are as follows:

Case No. 02-1244:

Petitioners: Beethoven.com LLC, InetProgramming Inc., Internet Radio Hawaii, Live365, and Wherever Radio.

Respondent: Librarian of Congress

Intervenors: AFTRA, AFM, RIAA

Movant-Intervenor: Intercollegiate Broadcast System, Harvard Radio Broadcasting Co., Inc.

Movant-Intervenor-Petitioner: Educational Information Corp.

Case No. 02-1246:

Petitioner: RIAA

Respondents: Librarian of Congress and Register of Copyrights

Case No. 02-1247

Petitioners: AFM

Respondents: Librarian of Congress and Register of Copyrights

Case No. 02-1248

Petitioners: AFTRA

Respondents: Librarian of Congress and Register of Copyrights

Case No. 02-1249

Petitioners: Salem and the NRBMLC

Respondent: Librarian of Congress

B. Ruling Under Review

The ruling under review is the June 20, 2002 final rule and order of the Librarian of Congress, James H. Billington, setting fees and terms for sound recording performances and

ephemeral recordings, which was published in the Federal Register on July 8, 2002. Final Rule and Order, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (July 8, 2002) ("Librarian's Order") (JA-0484).

C. Related Cases

Counsel is unaware of any related cases pending in any court.

Bruce G. Joseph

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Cir. R. 26.1 and Fed. R. App. P. 26.1, Salem Communications Corp. ("Salem"), National Religious Broadcasters Music License Committee ("NRBMLC"), and Live365, Inc. ("Live365"), by their respective attorneys, respectfully submit this corporate disclosure statement.

Salem is a publicly held Delaware Corporation that owns and/or operates more than 80 FCC-licensed broadcast radio stations nationwide, some of which have simulcast their programming over the Internet pursuant to the statutory licenses here at issue. Salem has no parent companies, and no publicly held company has a 10% or greater ownership interest in Salem.

The NRBMLC is a standing committee of the National Religious Broadcasters ("NRB"), a trade association representing more than 1,300 radio and television stations, program producers, multimedia developers, and related organizations around the world. The NRB is a non-profit corporation that has no parent companies, and no publicly held company has a 10% or greater ownership interest in the NRB. The NRBMLC's purpose is to represent the interests of religious and other mixed-talk and limited music formatted radio stations in issues of music and sound recording licensing. Many of the stations represented by the NRBMLC have simulcast their programming over the Internet pursuant to the statutory licenses here at issue.

Live365 is a corporation providing Internet transmission services to third parties through its website to use for, among other things, the making of eligible nonsubscription digital transmissions under statutory license. No publicly held company has a 10% or greater ownership in Live365. Live365 does not have a parent company.

STATEMENT REGARDING JOINT APPENDIX

Pursuant to Fed. R. App. P. 30(c), D.C. Cir. R. 30(c), and this Court's briefing schedule order of April 4, 2003, the parties intend to use a deferred joint appendix.

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GLOSSARY

AFM refers to the American Federation of Musicians of the United States and Canada, a national labor union representing musicians, which participated in the proceeding below.

AFTRA refers to the American Federation of Television and Radio Artists, a national labor union representing performing artists, which participated in the proceeding below.

ASCAP refers to The American Society of Composers, Authors and Publishers, which is a performing rights membership association of composers and music publishers responsible for licensing the non-dramatic public performances of the copyrighted musical works of its members. Together, ASCAP, BMI and SESAC represent virtually all U.S. copyrighted musical works in existence.

BMI refers to Broadcast Music, Inc., which is a performing rights association of composers and music publishers responsible for licensing the non-dramatic public performances of the copyrighted musical works of the copyright owners it represents. Together, ASCAP, BMI and SESAC represent virtually all U.S. copyrighted musical works in existence.

Broadcasters, as used in this brief, refers to the terrestrial radio broadcaster parties who participated in the proceeding below and who are engaging in, or interested in engaging in, simulcasting over the Internet of their over-the-air AM or FM radio broadcast programming.

CARP refers to the Copyright Arbitration Royalty Panel that recommended to the Librarian of Congress rates and terms for the digital public performances of sound recordings at issue in this proceeding for the period October 28, 1998 through December 31, 2002. In this brief, the "CARP" is also referred to as the "Panel."

Digital Sound Recording Performance Right refers to a new copyright in the public performance of sound recordings via certain digital audio transmissions. This copyright did not exist at all until 1995 and did not apply to non-subscription transmissions until 1998.

DPRA refers to the Digital Performance Right in Sound Recordings Act of 1995, which first granted performance rights in sound recordings under certain limited circumstances. Pub. L. No. 104-39, 109 Stat. 336 (1995).

Ephemeral Recording, as used in 17 U.S.C. §112, refers to reproductions of works for the sole purpose of performance.

IO Transmissions, or "**Internet-only Transmissions**," as used in this brief, refer to transmissions of programming exclusively over the Internet. This term contrasts with "simulcasts," which refer to simultaneous transmissions over the Internet of AM or FM radio broadcast programming transmitted over the air.

Librarian's Order refers to the final decision by the Librarian of Congress reviewing the February 20, 2002 Final Report of the Copyright Arbitration Royalty Panel determining the rates and terms for the digital performance of sound recordings and ephemeral recordings at issue in this proceeding. *See* Final Rule and Order, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (July 8, 2002) (JA-0484).

NRBMLC refers to the National Religious Broadcasters Music License Committee, which is a committee formed to represent the music licensing interests of religious, classical and other specialty formatted radio stations. In this proceeding, the NRBMLC represents 162 commercial radio stations owned by a great many different broadcasters that either stream or are interested in streaming their broadcast programming over the Internet as an ancillary service to their listeners.

Panel refers to the Copyright Arbitration Royalty Panel that recommended to the Librarian of Congress rates and terms for the digital public performances of sound recordings at issue in this proceeding for the period October 28, 1998 through December 31, 2002. In this brief, the "Panel" is also referred to as the "CARP."

Participant Licensee Petitioners refers to Salem Communications Corp., the National Religious Broadcasters Music License Committee, and Live365.com, Inc. Participant Licensee Petitioners participated fully as parties in the CARP proceeding and filed in this Court timely petitions to review the Librarian's Librarian's Order.

RIAA refers to the Recording Industry Association of America, the trade association that represents the U.S. recording industry. RIAA's member record companies create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. RIAA formed the "RIAA Negotiating Committee" to develop a coordinated strategy for exploitation of the digital sound recording performance right.

Services, as used in this brief, refers to the Broadcasters and Webcasters who participated in the proceeding below.

SESAC refers to SESAC, Inc., a performing rights organization responsible for licensing the non-dramatic public performances of the copyrighted musical works of the copyright owners it represents. "SESAC" originally stood for the "Society of European Stage Authors & Composers" but today is not an acronym for anything. Together, ASCAP, BMI and SESAC represent virtually all U.S. copyrighted musical works in existence.

Simulcast Transmissions refer to simultaneous transmissions over the Internet of AM or FM radio broadcast programming transmitted over the air. This term contrasts with "IO transmissions," or "Internet-only transmissions," which refer to transmissions of programming exclusively over the Internet.

Sound Recording typically refers to the fixation of renditions of musical works, which themselves typically are copyrighted works owned by music publishers.

Webcasters, as used in this brief, refers to the parties engaging in Internet-only transmissions of sound recordings who participated in the proceeding below.

JURISDICTIONAL STATEMENT

The Librarian's Order, 67 Fed. Reg. 45,240 (July 8, 2002), is the final decision by the Librarian of Congress ("Librarian") reviewing the February 20, 2002 Final Report (the "Report") of the Copyright Arbitration Royalty Panel (the "Panel" or the "CARP") in Docket No. 2000-9 CARP DTRA 1 & 2 (JA-0327-469; JA-0750-884). The Panel acted pursuant to Sections 112(e), 114(f)(2), 801(a) & (b), and 802(c) & (e).[1] The Librarian's jurisdiction to review the Report is conferred by Section 802(f). This Court has jurisdiction to review the Librarian's decision pursuant to Section 802(g).

Petitioners Salem Communications Corp. ("Salem"), the National Religious Broadcasters Music License Committee ("NRBMLC"), and Live365.com ("Live365") (collectively "Participant Licensee Petitioners") participated fully as parties in the CARP proceeding and, on March 6, 2002, filed timely petitions with the Librarian to set aside the determination of the CARP. 37 C.F.R. §251.55. On August 7, 2002, Salem, the NRBMLC, and Live365 filed petitions asking this Court to review the Librarian's Order.

STATUTES AND REGULATIONS

Addendum A to this brief contains the text of relevant statutes and regulations.

ISSUES PRESENTED FOR REVIEW

1. Did the Librarian act arbitrarily in imposing a single price from a single agreement between a single buyer and a cartel of sellers representing approximately 90% of copyrighted sound recordings as the price that most willing buyers would have paid to willing

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[1] Unless otherwise indicated, all statutory citations are to the Copyright Act, found in Title 17 of the United States Code.

sellers in a hypothetical, freely competitive market, where the cartel overtly colluded to force the highest possible price in that agreement for the purpose of manufacturing evidence for use in this proceeding, and where there are fundamental differences between that unique buyer and Participant Licensee Petitioners?

2. If the price set in that non-competitive agreement were to be used at all, did the Librarian act arbitrarily in refusing to reduce the price by the litigation costs that the buyer expected to save by entering into the agreement, where the seller cartel told the buyer and the buyer reasonably believed that the expense of litigating against the cartel would exceed the total amount to be paid under the agreement, the Librarian recognized that such an adjustment was appropriate and, contrary to the mistaken belief of the Librarian, undisputed evidence in the record permitted the Librarian to make the adjustment?

3. Did the Librarian act arbitrarily in reversing the arbitration panel's conclusion that the fair market price for sound recording performances made in Internet simulcasts of radio broadcasts should be lower than the price for such performances in programming developed specifically for the Internet, when the record confirmed material differences between such performances and that radio broadcasters [[ ]]?

STATEMENT OF THE CASE

Nature of the Case

This appeal is the culmination of the first-ever proceeding to establish the copyright royalty fees to be paid to record companies under the Sections 114(f)(2) and 112(e) statutory licenses for the newly created right to perform sound recordings by "streaming" over the Internet to listeners on a non-subscription basis and to make so-called "ephemeral recordings" to

facilitate those performances. Everyone agrees that the fee to be set is the fee to which most willing buyers and willing sellers (which the Panel and Librarian defined as individual record companies) would have agreed in a hypothetical, freely competitive market. The Librarian acted arbitrarily in setting fees that bear no relationship to the market and are contrary to the record.

Unfortunately, no direct evidence of a competitive marketplace existed because record companies representing approximately 90% of all copyrighted sound recordings, banded together to form a cartel – the "RIAA Negotiating Committee." The Panel found that the cartel overtly colluded to extract the highest possible prices from the handful of buyers most willing to pay those prices (for reasons unrelated to the value of the rights) for the purpose of manufacturing evidence for use in this proceeding.

As a consequence of its strategy, the cartel only reached agreement with 26 of the hundreds of services that had noticed their intent to rely on the statutory licenses. Notably, not a single radio broadcaster was willing to agree to the fees sought by the cartel to stream its over-the-air broadcast programming. The record demonstrated that broadcasters viewed the Internet as, at most, an ancillary means of reaching their over-the-air audience and that no broadcaster was making money from streaming. The record further demonstrated that the great majority of Internet-only webcasters, like Live365, were struggling to stay afloat and could not afford the fees sought by RIAA.

Despite this complete lack of competitive marketplace evidence, the Librarian imposed a fee based on a single agreement between a unique buyer – Yahoo!, Inc. ("Yahoo") – and the RIAA cartel. The Panel and Librarian relied exclusively upon this transaction despite the fact that the transaction was not at all "comparable" with what willing buyers would pay willing sellers in the relevant competitive market. The Yahoo agreement was infected with the market

power of the cartel, the seller differed from the individual record companies of the hypothetical market, and Yahoo's relevant business differed markedly from most Internet webcasting businesses. This was arbitrary.

More arbitrary is the Librarian's adoption of the Yahoo fee without any downward adjustment to account for the undisputed fact that Yahoo entered into the agreement to avoid the enormous costs of participating in this proceeding and that those costs would equal or exceed the license fees payable during the life of that agreement. Although the Librarian recognized that such an adjustment was appropriate to reduce the "inflated" Yahoo fee, he mistakenly ruled that no record evidence existed to make the appropriate reduction. Thus, the "fee" on which the Librarian based his decision did not reflect the fair market value of the rights at issue; rather, it reflected, essentially in its entirety, the cost of avoiding a costly and burdensome arbitration.

The Librarian also acted arbitrarily in reversing the Panel's conclusion that the fair market price for performances made in Internet simulcasts of radio broadcasts should be lower than the price for performances in programming developed for the Internet. The record fully supported the Panel's finding and demonstrated that most radio broadcasters [[ ]]

In short, the Librarian's Librarian's Order should be vacated, and this matter should be remanded to the Librarian with instructions to set new fees in a manner consistent with the arguments set forth below.

Proceedings Below

On November 27, 1998 and January 13, 2000, the Librarian commenced the six-month negotiation periods mandated by sections 114(f)(2)(A) and 112(e)(3) for the 1998-2000 and 2001-2002 statutory license terms. 63 Fed. Reg. 65,555 (Nov. 27, 1998) (JA-0096); 65 Fed.

Reg. 2,194 (Jan. 13, 2000) (JA-0099). In the absence of an industry-wide settlement, the Librarian consolidated the two periods and convened a CARP December 4, 2000. Librarian's Order at 45,241 (JA-0485).

The parties submitted written direct cases on April 11, 2001, and a live hearing before the three-arbitrator Panel commenced on July 30, 2001. The Panel heard 49 witnesses over 31 hearing days. Report 11-14 (JA-0345-48). The parties filed written rebuttal cases on October 4, 2001, and the Panel heard ten days of live rebuttal testimony from 26 witnesses. *Id.* at 15-16 (JA-0349-50).

Radio broadcasters who wished to simulcast their programming on the Internet ("Broadcasters") and Internet-only webcasters ("Webcasters") (collectively the "Services") asked the Panel to adopt fees based on the long-established fees paid by radio broadcasters for the analogous right to make public performances of musical works over-the-air. Jaffe W.D.T. 15-18 (JA-0148-51).[2] The Services argued that no established market – and therefore no reliable benchmark fees – existed for the public performance of sound recordings over the Internet and that fees for the musical work performance right, were by far the most reliable marketplace fees on which to base fees for the new right. *Id.*

The record companies (represented by their trade association, the RIAA) and performing artists (represented by their unions, AFM and AFTRA, (collectively "Copyright Owners and Performers") asked the Panel to adopt fees for the entire webcasting industry based on the 26 private agreements negotiated by RIAA's Negotiating Committee.

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[2] All written direct testimony in the CARP proceeding will be identified as "W.D.T." and written rebuttal testimony as "W.R.T."

The Panel issued its Report on February 20, 2002. The Panel rejected the Services' musical works benchmark in favor of "actual marketplace agreements, if they involve comparable rights and comparable circumstances." Report 43 (JA-0377). Nevertheless, the Panel then rejected 25 of the 26 RIAA agreements, finding that they resulted from a concerted effort by the RIAA Negotiating Committee to enter into above-market deals for use as evidence before the CARP. *Id.* at 47-51 (JA-0794-800). Thus, despite the voluminous record, the Panel's decision boiled down to its construction of a single deal – the Yahoo deal. Broadcasters, Webcasters, and Copyright Owners and Performers filed petitions to set aside the Panel's Report pursuant to 37 C.F.R. §251.55.

The Librarian's Order was published on July 8, 2002. 67 Fed. Reg. 45,240 (JA-0484). The Librarian accepted the Yahoo agreement as the appropriate benchmark but eliminated the differential between the fees for radio simulcasts and Internet-only webcasts set by the Panel. *Id.*

Petitions for review were filed by numerous statutory licensees, including Broadcasters and Webcasters that participated below and those that did not, RIAA, AFM, and AFTRA.

STATEMENT OF FACTS

A. Participant Licensee Petitioners

Participant Licensee Petitioners are services that make or want to make sound recording performances on the Internet. Salem is a commercial radio group specializing in providing radio content to audiences interested in religious and family-themed programming, which streams a number of its radio stations as an ancillary service to its listeners. The NRBMLC is a committee formed to represent the music and sound recording licensing interests of religious, classical and other specialty formatted radio stations. The NRBMLC here represents 162 commercial radio stations owned by many different broadcasters. Live365 is a leading Internet audio network,

offering what is believed to be the widest breadth of audio content in the world, by providing streaming services to individual hobbyists, college and nonprofit radio stations and commercial radio stations.[3]

B. The Sound Recording Performance Right and the Digital Millennium Copyright Act

The digital sound recording performance right at issue in this case is a new copyright right created in 1995 in the face of record industry concerns that certain performances by digital transmission would displace record sales. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. 104-39, 109 Stat. 336 (1995). At that time, the right applied only to subscription and interactive digital transmissions. *Id.* §3. Interactive transmissions were subject to individual licensing by the copyright owner, but qualifying subscription transmissions were entitled to a statutory license, with a fee determined by a CARP based on four policy factors set forth in section 801(b). Nonsubscription transmissions generally were exempt from the performance right. *Id.* Section 114(e) granted copyright owners an exemption from antitrust law to engage in collective negotiation and licensing under the statutory license.

The right was expanded with the passage of the Digital Millennium Copyright Act in 1998 to include performances by non-subscription digital transmissions. Non-subscription transmissions meeting specified conditions were entitled to a statutory license. Nonsubscription radio broadcast transmissions, however, both analog and digital, remained exempt. 17 U.S.C. §114(d)(1)(A). The fee standard was changed from the section 801(b)(1) policy factors to the

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[3] Radio broadcasters Clear Channel Communications, Inc. and Susquehanna Radio Corp., which participated in the proceeding below, and Bonneville International Corp. support this appeal.

"rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." *Id.* §114(f)(2)(B).

C. The RIAA Negotiating Committee and the 25 Rejected RIAA Agreements

Acting pursuant to its antitrust exemption, RIAA formed a committee of the five major record labels in 1998 to develop a comprehensive common strategy for licensing the digital sound recording performance right and to engage in coordinated, collective negotiations with services. Tr. 9050-52, 9059 (Marks) (JA-0598-601). The Committee represented the owners of approximately 90% of licensable sound recordings. Report 4 (JA-0338). This Committee ultimately negotiated 26 agreements, which RIAA advanced as evidence of what a "willing buyer would pay a willing seller" in the marketplace.

As RIAA's chief negotiator testified, the Committee "sat down early on to figure out what our objectives were and how we wanted to reach them." Tr. 9059 (Marks) (JA-0601). The Committee met every week, by conference call or in person, and correspondence regularly by email. *Id.* at 9057-58 (Marks). The Committee determined the terms RIAA would seek and accept in each license and planned general strategy. Report 48. Chief negotiator Steven Marks testified in detail how the Committee made its decisions on each deal by "consensus" of all of the companies. Tr. 9060-61 (Marks) ("our goal is to have everybody agree") (JA-0601.1-601.2).

The RIAA Committee developed a strategy of seeking supra-competitive license fees from potential licensees with specific problems in order to create evidence for the CARP. As the Panel found,

> [b]efore negotiating its first agreement, RIAA developed a strategy to negotiate deals for the purpose of establishing a high benchmark for later use as precedent, in the event a CARP proceeding were necessary. The RIAA Negotiating Committee reached a determination as to what it viewed as the "sweet spot" for the Section 114(f)(2) royalty. It then proceeded to close only those deals (with

> the exception of Yahoo!) that would be in substantial conformity with that "sweet spot."

Report 48 (JA-0382). The "sweet spot" was not based on any calculation of a reasonable rate of return or any economic study, but "simply reflected on the Negotiating Committee's instinct of what price the marketplace would bear." *Id.* at 48 n. 28 (JA-0382). The Panel found a "consistent RIAA strategy" to develop evidence to present to the CARP. *Id.* at 49 (JA-0383).

The RIAA Committee adopted a "take-it-or leave-it" approach, entering into agreements with services willing to agree to its terms for numerous reasons that did not reflect the value of the sound recording performance right. *Id.* at 48-51 (JA-0382-85). These reasons included, among others, settling uncertainty about costs in order to secure financing, enhancing relationships with the record companies in order to pursue other interests (such as services not subject to statutory license), and settling disputes concerning the eligibility of the service for the statutory license. *Id.* at 55-56 (JA-0389-90); Jaffe W.R.T. 59-64 (JA-0610-15); Jaffe Tr. 12438-41 (JA-0965-68).

The Panel found, however, that the majority of buyers "was simply unwilling to agree to the rates RIAA was seeking." Report 55-56 (JA-0389-90). Notably, not a single radio broadcaster was willing to pay the fees sought by RIAA. For this, and a host of other reasons including the fact that a number of the services that had agreed to RIAA's terms went out of business, never paid any fees under their agreement, or never commenced operations – the Panel concluded that 25 of the agreements "do not establish a reliable benchmark." *Id.* at 51-60 (JA-0385-94. The Librarian confirmed the Panel's rejection of the these agreements. Librarian's Order 45,262 (JA-0506) (finding arbitrary "reliance, even to a small degree" on the 25 "repudiated" agreements).

D. The Yahoo Agreement

As part of its overall strategy, RIAA set out to negotiate an agreement with Yahoo, one of the parties RIAA considered to be a major player in making sound recording transmissions. *See, e.g.* Tr. 559 (Rosen) (JA-0561); Report 68 n. 47 (JA-0402).

Yahoo was unique among streaming services, both with respect to its success and its business model. Yahoo's entire business centered on the Internet, where it operated as a "portal," providing a variety of content and services. Mandelbrot W.R.T. 1-2 (JA-0616-17). Its streaming operation centered on its role as an "aggregator," for the content of others, including, primarily, 400 radio broadcast stations. *Id.* at 2 (JA-0617). When it made its deal with RIAA, approximately 90% of its sound recording performances were from radio station retransmissions. *Id.* at 3 (JA-0618).

Everyone recognized that Yahoo would be a major player in any arbitration and would bear substantial costs. Report 68 (JA-0402). The Panel found that "[n]aturally, Yahoo! was willing to accept inflated royalty rates if it could realize an even greater saving in arbitration costs." *Id.* [[ ]]

(RIAA_Exh._137_DR_at_RIAA_N1009) (JA-0930-31).

In fact, the undisputed testimony was that Yahoo assessed the fees payable under an agreement with RIAA using a simple calculus:

> [o]n the [one] side we just looked at what we would have paid under the agreement. On the other side we had what we would have ended up paying following this arbitration, plus the litigation costs, plus the opportunity costs.

Tr. at 11,270-71. Mr. Mandelbrot explained that, "litigation costs" were the expected outside costs, and "opportunity costs" denoted internal disruption and loss of management time and attention caused by litigation. *Id.* Yahoo expected it to cost "over a million dollars to participate in this arbitration," with expected "opportunity costs" to exceed an additional million dollars. *Id.* at 11,274 (JA-0958). As he explained, "At the time that we entered into this agreement, we had a dramatically growing business. And it just felt like to try to -- to have people here in this arbitration rather than going out and building our business would have potentially been an enormous cost to us." *Id.* at 11,273-74 (JA-0957-58).

He further testified that, from October 28, 1998, through August 2001, Yahoo had spent $1.97 million in fees under the agreement. The following exchange summed up the essence of Yahoo's decision to make a deal with RIAA:

> THE WITNESS: Sorry to interrupt, Your Honor. But to sort of clarify this, as I said, so far we've paid 1.97 million for the royalties under our agreement. And if we estimate the opportunity costs at over a million dollars and the legal costs at over a million dollars, unless this panel were to decide that the music companies should actually be paying us to do the broadcasting --
>
> ARBITRATOR VON KANN: You'd have to get a negative royalty.
>
> THE WITNESS: Exactly.

Id. Tr. 11,294-95 (JA-0959-60). Yahoo elected not to renew the agreement after December 31, 2001. Tr. 14,717-18 (JA-0968-69). Thus, the total payments Yahoo made under the agreement were approximately equal to the cost savings Yahoo expected to realize by making the deal and avoiding this proceeding. In other words, the Yahoo agreement was not

indicative of the value of the performance right. Rather, it was, at most, indicative of the value of avoiding the costly CARP process.[4]

The Yahoo agreement required payment of a lump sum equal to $1.25 million for the first 1.5 billion performances. After that, the agreement set a fee of 0.2 cent per Internet-only performance and a fee of 0.05 cent per radio retransmission performance. Librarian's Order 45,251 (JA-0495). An ephemeral recording fee of about [[ ]] per year was also added. Report 61-63. (JA-0810-13) [[ ]] *Id.* at 62 (JA-0811).[5]

Yahoo concluded, in its business judgment, that it could not pass along the .05 cent per performance radio retransmission fee to radio stations whose programming it was retransmitting.

> [W]e've not passed any of these fees along to the radio stations because we have every interest in keeping those stations signed up with us. So we've made the business decision that it made more sense for us to actually stomach these fees than to try to pass them on to our radio station partners because we're afraid that if we tried to do that, they would terminate their agreements with us.

Tr. 11,429 (Mandelbrot) (JA-0963).

> Q. I just want to be clear that I understood. Yahoo!'s judgment is that if it passed along to the radio stations the radio station retransmission rate that it has negotiated, a lot of those stations would just pull the plug. Is that right?
> A. That is correct, yes.

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[4] Yahoo obtained other benefits from the deal that did not reflect the value of the sound recording performance right, including certainty for Yahoo and its customers, record label goodwill to facilitate licensing for on-demand services, Mandelbrot W.R.T. 3-4 (JA-0618-19), a partial Most Favored Nations clause, Report 67-68 (JA-0401-02), and a flat fee of $5,000 per year to cover performances on all streams of talk-based stations retransmitted by Yahoo, Mandelbrot W.R.T. 5-6 (JA-0620-21); Tr. 11,388-89 (Mandelbrot) (JA-0961-62).

[5] [[ ]] Report 63 (JA-0812).

Id. at 11,430 (JA-0964).

E. The Differences Between Simulcasting of Broadcasts and Internet-Only Webcasting and the Differences Between Participant Licensee Petitioners and Yahoo

The record contained extensive evidence, discussed in Part I.C *infra*, of the uniqueness of Yahoo and of the differences between it and radio broadcasters and other webcasters.

The record also contained extensive evidence, discussed in Part II *infra*, from record company and service witnesses that the simulcasting of radio broadcasts was materially different than Internet-only webcasting and should be subject to a lower fee.

F. The Musical Works Benchmark

The Services presented evidence that the best available benchmark for determining the fair market value of the performance right was the fee paid by radio broadcasters for the right to perform musical works over the air. Jaffe W.D.T. 15-18 (JA-0148-51). This was a mature, established market for a right that is virtually identical to the sound recording performance right. *Id.* It was also the basis relied upon by the Librarian in his only prior decision establishing sound recording performance fees under section 114. 63 Fed. Reg. 25,394 (May 8, 1998), *aff'd, RIAA v. Librarian*, 176 F.3d 528 (D.C. Cir. 1999).

The Services' expert, Professor Adam Jaffe, computed an estimate of the per-performance fees paid, on average, by more than 800 radio stations participating in the proceeding. Professor Jaffe explained that, because a service needed both rights to make a performance on the Internet, the demand for the sound recording right and the musical work right, like the demand for left shoes and right shoes, was identical. Jaffe W.R.T. 5. (JA-0178). Further, because the marginal cost of granting an Internet license was essentially zero, and the Internet performance right was an ancillary market for the record companies, he opined that in a

competitive market would behave in roughly the same way.[6] *Id.* at 7-10 (JA-0179-82). Based on this analysis, the Services proposed fees of .008 cent per radio simulcast performance and .014 cent per Internet-only performance. Services' Proposed Rates and Terms §2(a) (Nov. 6, 2001) ("Services' Proposed Rates") (JA-0185-94).

G. The Panel's Decision

The Panel concluded that the best basis for determining the fees that would prevail in the "hypothetical willing buyer/willing seller marketplace" would be "actual marketplace agreements if they involve comparable rights and comparable circumstances." Report 43 (JA-0377). The Panel recognized that the 26 RIAA agreements required close scrutiny, *id.* at 47 (JA-0381), and rejected 25 of the agreements for the reasons discussed above, *id.* at 47-60 (JA-0381-94).

Thus, the Panel relied entirely on its construction of the Yahoo agreement. The Panel recognized that Yahoo's desire to avoid arbitration costs and the most favored nations clause implied "somewhat *inflated* rates." *Id.* at 67-69 (emphasis in original) (JA-0401-03). However, the Panel decided to "adjust downward the IO rate to offset the inflationary factors previously identified . . . and we must adjust upward the RR rate." *Id.* at 75 (JA-0409). Ultimately, the Panel settled on a radio retransmission rate of 0.07 cent per performance[7] and an Internet-only rate of 0.14 cent per performance. It then added an ephemeral recording fee of 9% of the

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[6] The Services confirmed this analysis with data from another ancillary market, the market for the right to include sound recordings of musical works in television programs and motion pictures, which showed the fees paid for the musical work and sound recording to be [[ ]] *Id.* at 18-23 (JA-0603-08).

[7] A performance is a single recorded song played to one listener. Report 110 (JA-0444); Librarian's Order 45,260-61 (JA-0504-05).

performance fee, based on the fee paid by Yahoo, rounded slightly upwards in light of several of the 25 other RIAA agreements.

H. The Librarian's Decision

The Librarian similarly adopted the Yahoo agreement as his sole basis for decision. Although the Librarian acknowledged that the Services' musical works benchmark was potentially relevant, he concluded that the Panel was not required by law to adopt it "when it had actual evidence of marketplace value of the performance of the sound recordings in the record." Librarian's Order 45,247 (JA-0491). The Librarian, however, concluded that "the Panel's reliance on promotional value to justify the price differential for IO transmissions and radio retransmissions was arbitrary." *Id.* at 45,252 (JA-0496). Thus, he equated the radio retransmission and IO fees and concluded that the effective rate to which the parties agreed was 0.07 cent per performance. He also rejected any reliance on the 25 discredited agreements, setting the ephemeral recording fee at the 8.8% rate paid by Yahoo.

The Librarian recognized that the Services' contention that the Yahoo fee should be reduced to account for litigation costs savings "is well taken." However, he refused to make such an adjustment because, he believed, "the record contains no information quantifying the added value of the factors that purportedly resulted in inflated rates." *Id.* at 45,255 (JA-0499).

SUMMARY OF ARGUMENT

For non-subscription performances of sound recordings streamed over the Internet, record companies and performers are entitled to share a stream of royalties set at rates that most clearly represent the fees that would have been agreed between most willing buyers and willing sellers in a hypothetical freely, competitive market. In determining those events, the Panel and the Librarian *may* consider voluntary agreements, but such agreements must be "for comparable

types of digital audio transmission services and comparable circumstances," to those that would be made in the hypothetical competitive market. 17 U.S.C. §114 (f)(2)(B) (JA-0050-51).

The record companies, however, did not negotiate competitively. Instead, they formed a cartel and set out to create evidence that would justify a supra-competitive rate. In a nutshell, they demanded rates that the great majority of potential buyers rejected out of hand, but that were accepted by a very few with special needs - often as a prelude to going out of business. The arbitrators and the Librarian correctly perceived that these agreements were worthless and refused to rely on them as a measure of fair market price. Unfortunately, however, they made one exception, imposing the rate negotiated by the cartel with one user, Yahoo, as the rate for all users.

This was arbitrary for several reasons. First, the Yahoo market was nothing like the hypothetical competitive market of individual record company sellers that the Panel and Librarian deemed relevant. It was decidedly not competitive, and the sellers were a single cartel of all major record companies, representing 90% of the product sold, and acting pursuant to a common plan - not individual record companies acting against each other. Moreover, the market was a nascent market, which the Panel agreed "should be approached with caution," since participants in such markets typically cannot accurately assess their long-term prospects. Report 47 (JA-0381).

Further, Yahoo's business situation was very different from that of most Internet streamers, including, in particular, radio broadcasters simulcasting their programs, and other Internet-only companies. Unlike Yahoo, radio broadcasters viewed the Internet as a purely ancillary means of reaching a local audience that they could reach without any sound recording fee by their over-the-air broadcasts. No radio broadcaster was generating significant revenues by

streaming or was willing to pay substantial fees to make Internet simulcasts. In fact, Yahoo determined, based on its independent business judgment, that it could not pass along to radio broadcasters the fee to which it had agreed because they would "pull the plug." Tr. 11,430 (Mandelbrot) (JA-0964).

Live365 was also quite different from Yahoo's. It should be axiomatic that Yahoo, one of the biggest success stories of the dot.com bubble, was not typical of most Internet companies. Unlike Yahoo, Live365 is not and was not a huge, profitable, global mega-portal able to parlay website visits into substantial advertising revenues. Rather, like most on the Internet, it is a young service struggling to survive, providing streaming services primarily to individual hobbyists, who are unable to pay substantial royalties.

Secondly, it was arbitrary for the Librarian to reverse the Panel's determination that the fee for radio simulcasting should be lower than the fee for Internet-only webcasting. The Panel concluded that the fee for broadcast simulcasts should be "considerably lower than [Internet-only] rates" based on substantial reward evidence of promotional value, a recuded threat of sale displacement and other testimony. Report 74-75 (JA-0408-09).

Finally, Yahoo knew that it would need to protect its interests by participating in the upcoming arbitration proceeding and that it would be a central focus of that proceeding. The cartel represented to Yahoo, and Yahoo reasonably believed, that [[

[redacted].]]

The Librarian recognized that it would be appropriate to reduce the fee set in the agreement by Yahoo's litigation cost savings, but asserted that it could not quantify the effect of the savings. This was clear error, as the record provided the details to permit precisely that quantification.

STANDARD OF REVIEW

The Librarian is charged with reviewing CARP action to determine if it is "arbitrary or contrary to [law]." 17 U.S.C. §802(f). As the Librarian has recognized, this standard imports the review standard of the Administrative Procedure Act, 5 U.S.C. §706(2)(A). Librarian's Order, 45,242 (JA-0486). Agency action is to be considered arbitrary, among other things, if it

- relies on factors Congress did not intend for it to consider;
- offers an explanation for its decision that runs counter to the evidence presented before it;
- issues a decision that is so implausible that it cannot be explained as a product of agency expertise; or
- fails to examine the data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.

Id. at 45,242 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

The action of the Librarian is to be vacated or modified if this Court finds that "the Librarian acted in an arbitrary manner." 17 U.S.C.§802(g). While this court has construed its review to be "exceptionally deferential," *Nat'l Ass'n of Broad. v. Librarian*, 146 F.3d 907, 918

(D.C. Cir. 1998) ("*NAB*"), this Court is not a mere rubber stamp.[8] The Librarian's decision should be vacated or modified if the result does not "bear[] a rational relationship *to the record evidence*," "plainly contravene[s] applicable statutory provisions," or if the Librarian has not "offered a facially plausible explanation for it in terms of the record evidence," *RIAA v. Librarian*, 176 F.3d 528, 532, 535 (D.C. Cir. 1999). The decision must be reversed if "the evidence before the Librarian compels a substantially different" result. *NAB*, 146 F.3d at 918. Further, "[i]t is not enough for the Librarian simply to offer a plausible explanation for his actions; there must be record evidence to support" the decision. *RIAA*, 176 F.3d at 535.

The need for meaningful review in this Court is particularly important in light of the truncated review period allowed to the Librarian. The Librarian must act within 90 days of receiving the CARP's report. 17 U.S.C. §802(f). Further, the Librarian does not have the benefit of the parties' written objections for 14 days or replies for 28 days.

ARGUMENT

I. THE LIBRARIAN ACTED ARBITRARILY BY BASING HIS DETERMINATION OF THE SOUND RECORDING RIGHTS FEE THAT WOULD PREVAIL IN A COMPETITIVE MARKET ENTIRELY ON A SINGLE NON-COMPETITIVE AGREEMENT THAT WAS NEGOTIATED BETWEEN PARTIES AND UNDER UNIQUE CIRCUMSTANCES THAT WERE NOT COMPARABLE TO THE RELEVANT MARKET.

The Panel determined, and the Librarian affirmed, that the rates at issue here must be those to which most willing buyers and willing sellers would agree in a freely competitive

[8] Further, the deference described in *NAB* is questionable. The language of sections 802(f) and 802(g) are essentially identical, calling for reversal of action found to be "arbitrary." Subsection (f) requires full APA review. It is contrary to fundamental canons of statutory construction to construe the same term differently in different subsections of the same section of a statute. *See Comm'r v. Lundy*, 516 U.S. 235, 250 (1996).

marketplace. In determining those rates, the Panel may consider "comparable" agreements negotiation under "comparable" circumstances.

Having identified the relevant characteristics of the relevant market and the types of agreements that would be "comparable," it was grossly arbitrary for the Librarian and the Panel to base their decisions entirely on a single agreement that bore none of the identified hallmarks. As discussed in Part I.A, the market was anything but competitive. Moreover, both parties had their eyes firmly on the upcoming arbitration, resulting in an inflated fee. As discussed in Part I.B, the parties differed substantially from those who would participate in the relevant hypothetical competitive market.

Section 114 requires the Panel and the Librarian to determine the "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. §114(f)(2)(B). The parties agreed and the Panel concluded that this standard meant the fair market price that would prevail in a hypothetical freely competitive marketplace, unaffected by the existence of the statutory license. Report 21, 24-25 (JA-0355, JA-0358-59); Librarian's Order 45,244 (JA-0488). The Panel further found that the relevant standard was one in which the willing buyers would be individual streaming services and the willing sellers would be individual record companies. Report 24 (JA-0358). The Panel observed that such a marketplace would be characterized by "a range of negotiated rates" and, therefore, interpreted the statutory standard to require determination of "the rates to which, absent special circumstances, most willing buyers and willing sellers would agree" in that competitive marketplace. *Id.* at 24-25 (JA-0358-59). The Librarian accepted this characterization of the relevant market. Librarian's Order 45,244-45 (JA-0488-89).

Section 114(f)(2) further specifies that the Panel "shall" consider "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings." 17 U.S.C. §114(f)(2)(B). In addition, section 114(f)(2) permits, but does not require, the Panel to consider "the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements" *Id.* Section 114(f)(2) makes clear that to be considered, such agreements must be for "comparable" services under "comparable circumstances."

A. The Market in Which the Yahoo Agreement Was Negotiated Was Not Comparable to the Relevant Market and Was Not Freely Competitive.

1. The Yahoo Agreement Was Negotiated in a Nascent Market Controlled by a Cartel Seeking To Establish Unreasonably High Fees for Use As CARP Evidence.

The record conclusively demonstrated that the market in which the Yahoo agreement was negotiated was not a "competitive" market unconstrained by a statutory license. Rather, it was a non-competitive market controlled by a single cartel seller, acting pursuant to a statutory antitrust immunity, with a single plan to exploit the market and enter into agreements with supra-competitive prices in order to establish evidence for a CARP proceeding.

The Panel's reasoning as to the 25 rejected agreements underscores the presence and exercise of market power by RIAA. The Panel found that RIAA implemented a strategy to reach agreement with generally unsophisticated buyers or buyers with specific needs "willing to pay above-market rates." Report 50 (JA-0384). If the buyer did not want to pay what RIAA demanded, RIAA simply refused to make a deal. Because all of the significant individual record companies participated in the development of this strategy, there was no incentive or opportunity to undercut the cartel's price.

The Yahoo agreement was negotiated by the same cartel, at the same time, as part of the same strategy.[9] Moreover, the RIAA-Yahoo negotiations were infected by the non-competitive agreements RIAA had already negotiated. [[redacted]]

RIAA's strategy was particularly effective in the nascent market of Internet webcasting. The Panel recognized that agreements in such an industry "should be approached with caution, since they may not reflect fully educated assessments of the nascent businesses' long term prospects. Report 47 (JA-0382). As the Panel found, in such an industry, both sides would have "considerable uncertainty about the ultimate equilibrium value for the right." *Id.* at 47 (quoting Jaffe W.D.T. 15-16 (JA-0148-49). *see* Jaffe W.D.T. 13 & n.12 (JA-0147) (discussing ASCAP Consent Decree), which prohibits consideration by the ASCAP Rate Court of any deal made by ASCAP within the first five years of a new industry).

The Librarian attempts to justify the use of the non-competitive RIAA-Yahoo agreement, saying "it would make no sense for RIAA to take any other position in a marketplace negotiation. Sellers expect to make a profit and will extract from the market what they can." Librarian's Order 45,245 (JA-0489). But that reasoning simply underscores his error. RIAA, acting as a cartel, could be expected to exploit its market power to extract supra-competitive

[9] The Panel found that the Yahoo deal was negotiated with an eye towards its evidentiary effect in the CARP. *See, e.g.,* Report 64 (JA-0398). Further, the Panel recognized that the Yahoo deal was part and parcel of the overall RIAA strategy. *Id.* at 48 (JA-0382).

prices that did not reflect the fair market value of the rights at stake. The "expected" conduct of a cartel does not result in agreements that reflect a competitive fair market price.

2. The Panel and Librarian's Determination that the Market Power Exercised by RIAA Was Exactly Offset by the Existence of the Statutory License Was Purely Speculative and Contrary to the Record.

The Librarian also acted arbitrarily in affirming the Panel's conclusion that the existence of the statutory license exactly offset the RIAA Negotiating Committee's market power. Although the Panel recognized that the antitrust exemption in section 114(e)(1) "had the effect of strengthening the seller's bargaining power," it concluded that the market power of the RIAA Negotiating Committee should be "deemed to be effectively counterbalanc[ed]" by the mere existence of the compulsory license, which allowed services to make sound recording performances without negotiating a license. Report 46 (JA-0380). The Panel cited no specific evidence for this conclusion, relying instead "on a knowledgeable weighing of this voluminous record, including its own questioning and credibility assessments of more than 30 witnesses." *Id.* Without citing any evidence, the Librarian agreed with the Panel that, in the Yahoo negotiations, RIAA's "negotiating advantage disappeared" because Yahoo "brought comparable resources, sophistication and market power to the negotiating table" and chose to negotiate, but "could have continued to operate under the license and wait for the outcome of this proceeding." Librarian's Order 45,245 (JA-0489).

The Panel's finding was critical to its assessment of the Yahoo agreement. It was arbitrary, contrary to law, and should have been reversed by the Librarian. First, the CARP was required to "examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 45,242. "This goal cannot be reached by attempting to distinguish apparently inconsistent awards with simple,

undifferentiated allusions to a 10,000 page record." *Id.* at 45,243 (quoting *Christian Broad. v. CRT,* 720 F.2d 1295, 1319 (D.C. Cir. 1983) (JA-0487). Here, a conclusion that was inconsistent with the clear evidence of cartel behavior and the exercise of market power in securing above-market prices, could not be distinguished with a simple, undifferentiated allusion to a 20,000 page record.

Second, the finding was contrary to the Panel's own findings with respect to the 25 other agreements. The Panel specifically found that the RIAA Negotiating Committee had engaged in a concerted plan to enter into agreements with above-market royalty fees in order to create evidence for the CARP proceeding. Report 48-60 (JA-0797-809). This in itself demonstrated that the statutory license did not "effectively counterbalance" the cartel's market power. *See also* Tr. 6585 (Jaffe) ("[T]he market power that I've been talking about here is the market power that result when you have a single agent who is legally authorized and given antitrust immunity to negotiate on behalf of the multiple owners of the rights.") (JA0572).

If anything, rather than cleansing the RIAA Negotiating Committee of cartel power, the presence of the CARP ensured that the cartel would continue to pursue above-market fees. Any agreement with fees below the supra-competitive rates it sought would undermine its strategy for the whole industry.

Further, the Librarian ignored the undisputed evidence, discussed in Part III, *infra,* that Yahoo could not, without substantial cost, simply await "the outcome of this proceeding." As Professor Jaffe testified about the existence of the proceeding as a counterweight to market power, "[i]f the statutory license was not a good substitute for the RIAA deal from the licensee's perspective, then this immunization was ineffective, and the deal represents monopoly rates and terms rather than reasonable rates and terms." Report 54-55 (JA-0388-89). "The value of a

CARP-determined statutory license as a substitute for a voluntary deal is inherently limited by the legal costs that parties expect would accompany that option. Put simply, the cost of relying on the statutory license would be the expected reasonable rate plus litigation costs." Jaffe W.R.T. 64 (JA-0615).[10]

The record is devoid of evidence that one user, however large, possessed market power, resources or sophistication "comparable" to the collective power of the entire recording industry acting pursuant to a common scheme. To the contrary, the record demonstrated that Yahoo was constrained by the costs and burdens of the CARP process.

B. The Buyer and Seller in the Yahoo Agreement Differed Dramatically From Those that Would Exist in the Relevant Freely Competitive Market.

Neither the seller nor the buyer in the Yahoo agreement were comparable to those in the freely competitive marketplace envisioned in sections 112 and 114. The single seller was not a competing individual record company – it was a cartel of record companies representing approximately 90% of all copyrighted sound recordings, engaged in negotiating over-priced agreements for use as evidence in the CARP proceeding.

The buyers also differed fundamentally. [[ ]] It viewed streaming as [[ ]] Mandelbrot W.R.T. 1-2 (JA-0616-17). Because of its size, business model and position in the market, Yahoo was unique, and differed dramatically from both radio broadcasters and other webcasters.

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[10] This conclusion almost exactly foreshadowed [[ ]] *See* Part III, *infra*.

1. Unlike Yahoo, Radio Broadcasters Stream Primarily As an Ancillary Service To Their Core Local Listeners, Can Reach That Audience Without Payment of Any Sound Recording Performance Royalty, and Would Only Agree to Streaming Royalties at Rates Far Below Those to Which Yahoo Would Agree.

The buyers in the relevant market of broadcasters seeking sound recording simulcast rights would be individual radio broadcasters, with a very different business model than Yahoo. Yahoo's business was [[.]] Mandelbrot W.R.T. 1-2 (JA-0616-17. It had no access to any audience other than over the Internet. By contrast, for essentially all broadcasters, Internet simulcast streaming was an ancillary activity, secondary to their primary business of serving their local over-the-air audience and undertaken only to enhance their appeal to their local listening audience, not to compete in the global Internet market. Tr. 5327, 5336-37, 5349-50, 5352 (Halyburton) (JA-566-68; JA-0935-37); Tr. 7612-14, 7633-34, 7663-64 (S. Fisher) (JA-0574-78; JA-0585-86); Tr. 5874, 5879-80 (Donahoe) (JA-569-71); Tr. 8560 (Davis) (JA-0592); Halyburton W.D.T. 5, 7-8 (JA-0142-44); S. Fisher W.D.T. 6, 8 (JA-0135-36); Donahoe W.D.T. 7-8 (JA-0132-33).

Further, Broadcasters' local audience could be reached over-the-air without the payment of any fee to the record companies. 17 U.S.C. §114(d)(1)(A). As Professor Jaffe testified, this fact alone would have a significant impact when parties negotiate the fees to be paid for the same performances over the Internet. Jaffe W.R.T. 41 (JA-0183).

Unlike Yahoo, Broadcasters testified that streaming was generating little or no revenue and that they would cease streaming, with little adverse effect on their overall business, if significant fees were imposed. Tr. 5352-53 (Halyburton) (JA-0937-38); Tr. 8562-65 (Davis) (JA-0594-97); Tr. 7648-53 (S. Fisher) (JA-0579-84); Halyburton W.D.T. 10 (JA-0145); S. Fisher W.D.T. 6-7, 11-12, 16 (JA-0135-36; JA-0138-40); Mason W.D.T. 4-5 (JA-0153-54); Donahoe

W.D.T. 5-7 (JA-0130-32). In fact, [[ ]] of the broadcaster participants had managed to cover their costs of streaming, let alone make a profit. *See, e.g.,* Halyburton W.D.T. 10 (JA-0145); S. Fisher W.D.T. 12 (JA-0139).

Indeed, the record presented no evidence from which the Panel or the Librarian could determine that "most," if any, radio broadcasters would agree to pay even the .05 cent rate attributed by the Yahoo agreement to radio retransmissions.

The only evidence before the Panel was to the contrary. No radio broadcasters had agreed to any fee proposed by the RIAA. Moreover, Yahoo had concluded that it could not pass on even a .05 cent per performance fee to its radio simulcasting customers because "they would terminate their agreements with us." In short, they "would just pull the plug." Tr. 11,429, 11,430 (Mandelbrot) (JA-0963-64).

The Librarian found that Yahoo did not actually try to pass along the .05 cent fee, so that they could not be sure broadcasters would not pay it. Librarian's Order 45,255 (JA-0499). But neither RIAA nor the Librarian cited anything in the record to cast doubt upon Yahoo's self-interested business judgment on this issue. Ironically, both the Panel and the Librarian relied exclusively upon Yahoo's business judgment and "sophistication" in setting their ultimate fees. It would be arbitrary to conclude that judgment was somehow flawed on this particular point. Neither the Panel nor the Librarian made any such finding.

Thus, at least as to radio broadcasters, it was arbitrary for the Panel and the Librarian to determine that .07 cent per performance represented "the rates to which, absent special

circumstances, most willing buyers and willing sellers would agree." *Id.* at 45,244-45 (JA-0488-89).[11]

2. Unlike Yahoo, But Like Most Webcasters, Live 365 Was a Struggling Business, With a Business Model Markedly Different From Yahoo's, Which Could Not Pay Yahoo's Fees.

Live365's business model also differed markedly from Yahoo's. Unlike Yahoo, Live365 is not a huge, profitable, global mega-portal able to turn website visits into substantial advertising revenues. It was not profitable at the time of the CARP and is not so now. Unlike Yahoo, Live365's only business its business is centered on providing webcasting services to individuals, groups and professionals, permitting them to create Internet audio streams without investing in equipment and bandwidth and without technical expertise. The great majority of Live365's users are individuals who perform music solely to reflect their own tastes, often in hopes of helping others to discover little-known artists or songs that they feel deserve wider attention. These individuals are unable to pay substantial royalty fees.

Further, unlike Yahoo, but like most other webcasters, Live365 does not yet have positive cash flow and the rate and structure of their royalty obligations are critical to their ability to survive. *See, e.g.* Tr. 8214, 8216 (Jeffrey) (JA-0589-91); Tr. at 4318-19 (Wise) (JA-0932-33), Tr. at 4480 (Pakman) (JA-0934); cf. Tr. 3986-87 (Fisher) (JA-0562-63). Live365 has struggled in a difficult market to sell Internet audio advertising. Tr. 8128 (Jeffrey) (JA-0588). The majority of webcaster are in an "incubation" stage. *See, e.g.*, Tr. 7480 (Moore) (JA-0573); Tr. 7111-12 (Juris) (JA-939-40); Tr. 4129-30 (Wise) (JA-0564-65); Tr. 7795 (Pearson) (JA-

[11] Subsequent events demonstrated that the .07 cent fee was too rich even for Yahoo. Within one week after the Librarian announced his decision affirming the .07 cent fee, Yahoo announced that it was shutting down its radio retransmission business. *See* Addendum B.1.

0587); Tr. 7308-11 (Roy) (JA-0941-44). It should be axiomatic that Yahoo, one of the biggest success stories of the dot.com bubble, was not typical of most Internet companies.

3. It Was Arbitrary and Contrary to Law for the Panel and the Librarian To Refuse To Account for these Fundamental Differences in Imposing the Fees Agreed by Yahoo on Non-Comparable Broadcasters and Webcasters.

The Panel noted these fundamental differences in the relevant buyers, but found "no record basis to quantify any possible difference in value. Stated differently, the Panel does not and cannot know whether these arguments would impact the rate negotiated by a willing buyer and willing seller or to what degree." Report 84-85 (JA-418-19).

The Librarian similarly recognized that "Yahoo's business model is somewhat unique" and that the Services' argument that the Yahoo agreement was not comparable "appears to be a valid point." Librarian's Order at 45,249 (JA-0493). The Librarian further recognized that Yahoo made its deal "in light of its needs and position in the marketplace."[12] *Id.* at 45,245 (JA-0489). However, neither the Librarian nor the Panel assessed the significance of these differences in Yahoo's negotiation of its agreement.

Both the Panel and the Librarian took the position that that the Services had the burden of quantifying those differences. *Id.* at 45,254-55 (JA-0498-99). Of course, it was RIAA that chose to rely on the Yahoo deal, not the Broadcasters or Webcasters. It was not the Services' burden to quantify differences from a benchmark that they considered fatally flawed in the first place. Absent such a showing, the appropriate result was to conclude that the Yahoo agreement was not

[12] Only later, evidence surfaced regarding just how unique those "needs" and interests were. Yahoo's streaming activities were built on a company, Broadcast.com, that it acquired in August, 1999. As Mark Cuban, the founder and President of Broadcast.com and individual with whom RIAA began its negotiations, wrote in June 2002 to industry newsletter "Radio and Internet News," the deal with RIAA was designed with rates that would drive others out of the business "so that there would be less competition." Addendum B.2.

a "comparable." The failure to adjust the situation of the buyers and sellers in the RIAA-Yahoo agreement to make them comparable to those in the relevant hypothetical marketplace was arbitrary.

II. THE LIBRARIAN ACTED ARBITRARILY IN REJECTING THE PANEL'S FINDING THAT BROADCAST SIMULCAST PERFORMANCES SHOULD PAY A LOWER FEE THAN INTERNET-ONLY PERFORMANCES.

The record contained extensive evidence from record company and Service witnesses that the simulcasting of radio broadcasting was materially different than Internet-only webcasting, and should be subject to a lower fee. The Panel agreed. The Librarian acted arbitrarily when he reversed this decision.

[[ ]] Tr. 11,251 (Mandelbrot) (JA-0956). [[ ]] Mandelbrot W.R.T. 5 (JA-0620). [[ ]] *Id.*

Broadcasters consistently testified that over-the-air radio was programmed for the local audience, and that the programming reflected the needs of competition in the over-the-air market, not to compete in the global Internet market. *See* Record cites in Part I.B.1. All of the Services, including Internet-only Webcasters, proposed a lower fee for simulcasting than for Internet-only transmissions. Services Proposed Rates §2(a) (JA-0186).

The Panel found there to be "essentially undisputed testimony that traditional over-the-air radio play has a tremendous promotional impact on phonorecord sales. Indeed record companies have spent many millions of dollars over many decades to promote over-the-air play of their releases." Report 74-75 (citing record) (JA-0408-09). The Panel also noted that endorsements from familiar, trusted DJs were "a key element in promoting sales." *Id.* at 75 (relying on, *inter alia,* RIAA witness McDermott) (JA-0409). It thus concluded that "[t]o the extent that internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional impact is any less." *Id.*[13] Further, the Panel found that "RIAA concerns about displacement of CD sales from internet performances do not apply equally to retransmissions of radio broadcasts," *id.*, thus "warrant[ing] a lower rate," *id.* at 84 (JA-0418).

As a result of this undisputed record evidence, the Panel found that the radio simulcast rate should be "considerably lower than [Internet-only] rates." The Librarian found this conclusion to be arbitrary in light of the fact that the record of the Yahoo/RIAA negotiations did not reflect explicit consideration of promotional value and the Panel had found that it could not quantify the promotional value of webcasting. Librarian's Order 45,253 (JA-0497).

However, the Panel's recognition of a lower simulcast rate relied upon factors that Congress expressly directed it to consider (promotional value and displacement, among others) and was properly explained in light of the record evidence. *See Motor Vehicle Mfrs. Ass'n*, 463

[13] No other conclusion could be drawn from the record. RIAA's witness conceded that "[p]er capita per listener minute, the promotional benefit to Sony of someone listening to a radio signal over-the-air and someone in the same geographical area listening to the same signal over their computer is going to be very similar." Tr. 12861-62 (McDermott) (JA-0601.11-0601.12).

U.S. at 42-44. It should have been affirmed. It arbitrary for the Librarian not to adopt a fee for simulcasts that was "considerably lower" than the Internet only fee.[14]

III. THE LIBRARIAN ACTED ARBITRARILY BY REFUSING TO ADJUST THE YAHOO FEE TO ACCOUNT FOR YAHOO'S LITIGATION COST SAVINGS DESPITE HIS OWN ACKNOWLEDGEMENT THAT SUCH AN ADJUSTMENT WAS APPROPRIATE.

The Librarian's refusal to reduce the Yahoo fee to account for Yahoo's litigation-related cost savings also was arbitrary and contrary to the record. Librarian's Order 45,255 (JA-0499). The Librarian agreed that such a reduction was appropriate, but failed to make the adjustment on the asserted basis that "the record contains no information quantifying the added value" of this factor. *Id.* This explanation was simply not plausible in light of the undisputed record evidence to the contrary.

Yahoo's witness provided detailed evidence of litigation-related savings that it expected from making a deal with RIAA.[15] Mr. Mandelbrot testified as to the [[[redacted] .]] Indeed, Arbitrator Von Kann expressly quantified the significance of the costs based on Yahoo's

[14] If anything, the Librarian's dissatisfaction with the precise nature of the Panel's adjustment of the nominal Yahoo rates was further evidence of the unique circumstances facing Yahoo and another reason to question the comparability of the Yahoo deal in the first instance.

[15] Mr. Mandelbrot's testimony was generally credited and was extensively relied upon by the Panel. Report 67 (JA-0401).

own calculus: "You'd have to get a negative royalty." Tr. 11,294-95 (Mandelbrot) (JA-0959-60).[16]

This error was fundamental to the Librarian's decision. If the fees paid under the Yahoo deal represented litigation cost savings to Yahoo, they did not represent what a willing buyer would pay in a competitive market unaffected by the statutory license for the sound recording performance and ephemeral recording rights. Yahoo made clear that it compared litigation costs plus CARP-determined fair market value of the rights against the costs to be paid under the agreement. *Id.* at 11,294-95 (Mandelbrot) (JA-0959-60). All that can be concluded about Yahoo as a willing buyer was that it expected the CARP to set a fair market value of [[ ]][17]

CONCLUSION

The Librarian's exclusive reliance on the Yahoo agreement as a comparable agreement in a comparable market for performance and ephemeral recording fees was clearly arbitrary and contrary to the record. As a result of the Librarian's erroneous belief that the Yahoo agreement was comparable, the Librarian rejected the musical works benchmark advanced by the Services. The decision of the Librarian should be vacated, with instructions to evaluate the record in its entirety, without regard to any of the 26 agreements negotiated by the RIAA cartel in furtherance of its scheme to create CARP evidence.

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[16] The Librarian erroneously cited an inapposite passage in the Report for the proposition that no quantification was possible. Librarian's Order 45,255 (JA-0499). The cited passage had nothing to do with Yahoo. It related only to the Services' own musical works model. Report 29 (JA-0363).

[17] Further, as Professor Jaffe testified, the value of the CARP proceeding as a means of offsetting RIAA's market power was reduced by the amount of the expected litigation costs. Jaffe W.R.T. 64 (JA-0615). Thus, the fee paid by Yahoo was as much a manifestation of the RIAA cartel's market power as it was a reflection of a competitive fair market price.

Even if the Yahoo agreement was relevant, the failure to account for Yahoo's litigation and "opportunity" cost savings was arbitrary. At most, the Yahoo agreement, reflects nothing more than a fair market fee roughly equal to [[.]] The Librarian should be instructed that it is entitled to no greater weight.

Finally, the Librarian's refusal to set a lower fee for broadcast simulcasts than for Internet-only performances was arbitrary and contrary to the record. The Librarian should be instructed properly to reflect this fact in his decision.

Respectfully submitted,

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March 4, 2004

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C), D.C. Cir. R. 32(a), and this Court's briefing format order of April 4, 2003, the undersigned certifies the following:

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir R. 32(a)(2), this brief contains 9,919 words.

2. This brief has been printed using a proportionally spaced, 12-point Times New Roman typeface.

Dineen Pashoukos Wasylik

March 4, 2004

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5 U.S.C. § 706

Section 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§ 101 · Definitions[2]

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.[3]

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.[4]

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.[5]

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed

at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other nonanalog format.[6]

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.[7]

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.[8]

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.[9]

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.[10]

The "gross square feet of space" of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.[11]

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is—

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;
(5) the WIPO Copyright Treaty;[12]
(6) the WIPO Performances and Phonograms Treaty;[13] and
(7) any other copyright treaty to which the United States is a party.[14]

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.[15]

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.[16]

For purposes of section 513, a "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable

system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.[17]

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.[18]

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.[19]

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a "United States work" only if—

(1) in the case of a published work, the work is first published—

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.[20]

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.[21]

The "WIPO Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.[22]

A "work of visual art" is—

(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.[23]

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment—

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.[24]

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.[25]

§ 112 · Limitations on exclusive rights: Ephemeral recordings[44]

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114 (a) or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright

owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if—

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) STATUTORY LICENSE.—(1) A transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f) is entitled to a statutory license, under the conditions specified by this subsection, to make no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more), if the following conditions are satisfied:

(A) The phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it.

(B) The phonorecord is used solely for the transmitting organization's own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

(C) Unless preserved exclusively for purposes of archival preservation, the phonorecord is destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord.

(D) Phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the phonorecord under this subsection from a phonorecord lawfully made and acquired under the authority of the copyright owner.

(2) Notwithstanding any provision of the antitrust laws, any copyright owners of sound recordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(3) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation

proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) of this subsection during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(4) In the absence of license agreements negotiated under paragraph (2), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (3), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The copyright arbitration royalty panel shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms under voluntary license agreements negotiated as provided in paragraphs (2) and (3). The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

(5) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

(6) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (3) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1), during a 60-day period commencing on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be concluded in accordance with section 802.

(7)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

(8) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

(9) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under section 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if—

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(g) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.

§ 114 · Scope of exclusive rights in sound recordings[46]

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) LIMITATIONS ON EXCLUSIVE RIGHT. — Notwithstanding the provisions of section 106(6) —

(1) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS. — The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of —

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission —

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however —

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are—

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories—

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522 (12)), of a transmission by

a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

(2) STATUTORY LICENSING OF CERTAIN TRANSMISSIONS.—

The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—

(A)(i) the transmission is not part of an interactive service;

(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

(i) the transmission does not exceed the sound recording performance complement; and

(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998—

(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless—

(I) the broadcast station makes broadcast transmissions—

(aa) in digital format that regularly exceed the sound recording performance complement; or

(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement as provided in this clause;

(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

(iii) the transmission—

(I) is not part of an archived program of less than 5 hours duration;

(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

(III) is not part of a continuous program which is of less than 3 hours duration; or

(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration, except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting

entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.

(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided, however*, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services; *Provided, however*, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided*, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if—

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph—

(i) a "licensor" shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

(ii) a "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

(4) RIGHTS NOT OTHERWISE LIMITED.—

(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

(B) Nothing in this section annuls or limits in any way—

(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

(iii) any other rights under any other clause of section 106, or remedies available under this title as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(e) AUTHORITY FOR NEGOTIATIONS.—

(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided*, That each copyright owner shall establish the royalty rates and material license terms and conditions

unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: *Provided*, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

(f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.[47]

(1)(A)[48] No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2001, or, if a copyright arbitration royalty panel is convened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel's determination). Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Librarian of Congress licenses covering such subscription transmissions with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the copyright arbitration royalty panel may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in subparagraph (A).

(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—

(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational; and

(II) in the first week of January 2001, and at 5-year intervals thereafter.

(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I) of this subparagraph; or

(II) on July 1, 2001, and at 5-year intervals thereafter.

(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

(2)(A) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Librarian of Congress licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel

to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including—

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).

(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated in accordance with regulations that the Librarian of Congress shall prescribe—

(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational; and

(II) in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I); or

(II) on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

(4)(A) The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

(5)(A) Notwithstanding section 112(e) and the other provisions of this subsection, the receiving agent may enter into agreements for the reproduction and performance of sound recordings under section 112(e) and this section by any 1 or more small commercial webcasters or noncommercial webcasters during the period beginning on October 28, 1998, and ending on December 31, 2004, that, once published in the Federal Register pursuant to subparagraph (B), shall be binding on all copyright owners of sound recordings and other persons entitled to payment under this section, in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress. Any such agreement for small commercial

webcasters shall include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by small commercial webcasters or noncommercial webcasters. The receiving agent shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement.

(B) The Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A). Such publication shall include a statement containing the substance of subparagraph (C). Such agreements shall not be included in the Code of Federal Regulations. Thereafter, the terms of such agreement shall be available, as an option, to any small commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.

(C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

(D) Nothing in the Small Webcaster Settlement Act of 2002 or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Librarian of Congress of July 8, 2002, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—

(i) the term "noncommercial webcaster" means a webcaster that—

(I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes;

(ii) the term "receiving agent" shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002; and

(iii) the term "webcaster" means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor to make eligible nonsubscription transmissions and ephemeral recordings.

(F) The authority to make settlements pursuant to subparagraph (A) shall expire December 15, 2002, except with respect to noncommercial webcasters for whom the authority shall expire May 31, 2003.

(g) PROCEEDS FROM LICENSING OF TRANSMISSIONS.—

(1) Except in the case of a transmission licensed under a statutory license in accordance with subsection (f) of this section—

(A) a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

(2) An agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or

any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

(C) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

(3) A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than copyright owners and performers who have elected to receive royalties from another designated agent and have notified such nonprofit agent in writing of such election, the reasonable costs of such agent incurred after November 1, 1995, in—

(A) the administration of the collection, distribution, and calculation of the royalties;

(B) the settlement of disputes relating to the collection and calculation of the royalties; and

(C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(4) Notwithstanding paragraph (3), any designated agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such agent incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such agent a contractual relationship that specifies that such costs may be deducted from such royalty receipts.

(h) LICENSING TO AFFILIATES.—

(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and

conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

(A) an interactive service; or

(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(i) No Effect on Royalties for Underlying Works.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

(j) Definitions.—As used in this section, the following terms have the following meanings:

(1) An "affiliated entity" is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or nonvoting stock.

(2) An "archived program" is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.

(3) A "broadcast" transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

(4) A "continuous program" is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.

(5) A "digital audio transmission" is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

(6) An "eligible nonsubscription transmission" is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1)

that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(7) An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

(8) A "new subscription service" is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(9) A "nonsubscription" transmission is any transmission that is not a subscription transmission.

(10) A "preexisting satellite digital audio radio service" is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(11) A "preexisting subscription service" is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(12) A "retransmission" is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as

provided in this section, a transmission qualifies as a "retransmission" only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

(13) The "sound recording performance complement" is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

(14) A "subscription" transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

(15) A "transmission" is either an initial transmission or a retransmission.

§ 801 · Copyright arbitration royalty panels: Establishment and purpose[2]

(a) ESTABLISHMENT.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, is authorized to appoint and convene copyright arbitration royalty panels.

(b) PURPOSES.—Subject to the provisions of this chapter, the purposes of the copyright arbitration royalty panels shall be as follows:

(1) To make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 114, 115, 116, and 119, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

(2) To make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act: *Provided*, That if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted: *And provided further*, That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The copyright arbitration royalty panels may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the copyright arbitration royalty panels shall consider, among other factors, the economic impact on copyright owners and users: *Provided*, That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15,1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment.

(3) To distribute royalty fees deposited with the Register of Copyrights under sections 111, 116, 119(b), and 1003, and to determine, in cases where controversy exists, the distribution of such fees.

(c) RULINGS. — The Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel, including—

(1) authorizing the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Librarian has found are not subject to controversy; and

(2) accepting or rejecting royalty claims filed under sections 111, 119, and 1007 on the basis of timeliness or the failure to establish the basis for a claim.

(d) SUPPORT AND REIMBURSEMENT OF ARBITRATION PANELS. — The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter, and shall reimburse the arbitrators presiding in distribution proceedings at such intervals and in such manner as the Librarian shall provide by regulation. Each such arbitrator is an independent contractor acting on behalf of the United States, and shall be hired pursuant to a signed agreement between the Library of Congress and the arbitrator. Payments to the arbitrators shall be considered reasonable costs incurred by the Library of Congress and the Copyright Office for purposes of section 802(h)(1).

§ 802 · Membership and proceedings of copyright arbitration royalty panels[3]

(a) COMPOSITION OF COPYRIGHT ARBITRATION ROYALTY PANELS. — A copyright arbitration royalty panel shall consist of 3 arbitrators selected by the Librarian of Congress pursuant to subsection (b).

(b) SELECTION OF ARBITRATION PANEL. — Not later than 10 days after publication of a notice in the Federal Register initiating an arbitration proceeding under section 803, and in accordance with procedures specified by the Register of Copyrights, the Librarian of Congress shall, upon the recommendation of the Register of Copyrights, select 2 arbitrators from lists provided by professional arbitration associations. Qualifications of the arbitrators shall include experience in conducting arbitration proceedings and facilitating the resolution and settlement of disputes, and any qualifications which the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt by regulation. The 2 arbitrators so selected shall, within 10 days after their selection, choose a third arbitrator from the same lists, who shall serve as the chairperson of the arbitrators. If such 2 arbitrators fail to agree upon the selection of a third arbitrator, the Librarian of Congress shall promptly select the third arbitrator. The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt regulations regarding standards of conduct which shall govern arbitrators and the proceedings under this chapter.[4]

(c) ARBITRATION PROCEEDINGS. — Copyright arbitration royalty panels shall conduct arbitration proceedings, subject to subchapter II of chapter 5 of title 5, for the purpose of making their determinations in carrying out the purposes set forth

in section 801. The arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c). Any copyright owner who claims to be entitled to royalties under section 111, 112, 114, 116, or 119, any transmitting organization entitled to a statutory license under section 112(g), any person entitled to a statutory license under section 114(d), any person entitled to a compulsory license under section 115, or any interested copyright party who claims to be entitled to royalties under section 1006, may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party, and any other person participating in arbitration proceedings may submit such relevant information and proposals to the arbitration panel conducting the proceedings. In ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct. In distribution proceedings, the parties shall bear the cost in direct proportion to their share of the distribution.

(d) PROCEDURES.—Effective on the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, the Librarian of Congress shall adopt the rules and regulations set forth in chapter 3 of title 37 of the Code of Federal Regulations to govern proceedings under this chapter. Such rules and regulations shall remain in effect unless and until the Librarian, upon the recommendation of the Register of Copyrights, adopts supplemental or superseding regulations under subchapter II of chapter 5 of title 5.

(e) REPORT TO THE LIBRARIAN OF CONGRESS.—Not later than 180 days after publication of the notice in the Federal Register initiating an arbitration proceeding, the copyright arbitration royalty panel conducting the proceeding shall report to the Librarian of Congress its determination concerning the royalty fee or distribution of royalty fees, as the case may be. Such report shall be accompanied by the written record, and shall set forth the facts that the arbitration panel found relevant to its determination.

(f) ACTION BY LIBRARIAN OF CONGRESS.—Within 90 days after receiving the report of a copyright arbitration royalty panel under subsection (e), the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel. The Librarian shall adopt the determination of the arbitration panel unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title. If the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of an additional 30-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be. The Librarian shall cause to be published in the Federal Register the determination of the arbitration panel, and the decision of the Librarian (including an order issued under the preceding sentence).

The Librarian shall also publicize such determination and decision in such other manner as the Librarian considers appropriate. The Librarian shall also make the report of the arbitration panel and the accompanying record available for public inspection and copying.

(g) JUDICIAL REVIEW.—Any decision of the Librarian of Congress under subsection (f) with respect to a determination of an arbitration panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. If no appeal is brought within such 30-day period, the decision of the Librarian is final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in the decision. When this title provides that the royalty rates or terms that were previously in effect are to expire on a specified date, any adjustment by the Librarian of those rates or terms shall be effective as of the day following the date of expiration of the rates or terms that were previously in effect, even if the Librarian's decision is rendered on a later date. The pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under sections 111, 112, 114, 115, 116, 118, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections. The court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner. If the court modifies the decision of the Librarian, the court shall have jurisdiction to enter its own determination with respect to the amount or distribution of royalty fees and costs, to order the repayment of any excess fees, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the decision of the arbitration panel and remand the case to the Librarian for arbitration proceedings in accordance with subsection (c).

(h) ADMINISTRATIVE MATTERS.—

(1) DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM ROYALTY FEES.—The Librarian of Congress and the Register of Copyrights may, to the extent not otherwise provided under this title, deduct from royalty fees deposited or collected under this title the reasonable costs incurred by the Library of Congress and the Copyright Office under this chapter. Such deduction may be made before the fees are distributed to any copyright claimants. In addition, all funds made available by an appropriations Act as offsetting collections and available for deductions under this subsection shall remain available until expended. In ratemaking proceedings, the reasonable costs of the Librarian of Congress and the Copyright Office shall be borne by the parties to the proceedings as directed by the arbitration panels under subsection (c).

(2) POSITIONS REQUIRED FOR ADMINISTRATION OF COMPULSORY LICENSING.—Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.

Public Law 104-39
104th Congress

An Act

Nov. 1, 1995
[S. 227]

To amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Digital Performance Right in Sound Recordings Act of 1995.
Copyrights.
Communications.
17 USC 101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Digital Performance Right in Sound Recordings Act of 1995".

SEC. 2. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS.

Section 106 of title 17, United States Code, is amended—

(1) in paragraph (4) by striking "and" after the semicolon;

(2) in paragraph (5) by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.".

SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.

Section 114 of title 17, United States Code, is amended—

(1) in subsection (a) by striking "and (3)" and inserting "(3) and (6)";

(2) in subsection (b) in the first sentence by striking "phonorecords, or of copies of motion pictures and other audiovisual works," and inserting "phonorecords or copies";

(3) by striking subsection (d) and inserting:

"(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwithstanding the provisions of section 106(6)—

"(1) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

"(A)(i) a nonsubscription transmission other than a retransmission;

"(ii) an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public; or

"(iii) a nonsubscription broadcast transmission;

"(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission—

"(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

"(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

"(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

"(ii) the retransmission is of radio station broadcast transmissions that are—

"(I) obtained by the retransmitter over the air;

"(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

"(III) retransmitted only within the local communities served by the retransmitter;

"(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

"(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

"(C) a transmission that comes within any of the following categories—

"(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

"(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

"(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as

defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522(12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

"(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

"(2) SUBSCRIPTION TRANSMISSIONS.—In the case of a subscription transmission not exempt under subsection (d)(1), the performance of a sound recording publicly by means of a digital audio transmission shall be subject to statutory licensing, in accordance with subsection (f) of this section, if—

"(A) the transmission is not part of an interactive service;

"(B) the transmission does not exceed the sound recording performance complement;

"(C) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted;

"(D) except in the case of transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

"(E) except as provided in section 1002(e) of this title, the transmission of the sound recording is accompanied by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

"(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

"(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided, however*, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

"(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

"(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services: *Provided, however,* That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

"(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

"(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided,* That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

"(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if—

"(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

"(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

"(E) For the purposes of this paragraph—

"(i) a 'licensor' shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

"(ii) a 'performing rights society' is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

"(4) RIGHTS NOT OTHERWISE LIMITED.—

"(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

"(B) Nothing in this section annuls or limits in any way—

"(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

"(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

"(iii) any other rights under any other clause of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

"(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995."; and

(4) by adding after subsection (d) the following:

"(e) AUTHORITY FOR NEGOTIATIONS.—

"(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

"(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

"(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided*, That each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

"(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: *Provided*, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

"(f) LICENSES FOR NONEXEMPT SUBSCRIPTION TRANSMISSIONS.—

Federal Register, publication.

"(1) No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995,

the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2000. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings or any entities performing sound recordings affected by this section may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

"(2) In the absence of license agreements negotiated under paragraph (1), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (1), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in paragraph (1). The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

Federal Register, publication.

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"(3) License agreements voluntarily negotiated at any time between one or more copyright owners of sound recordings and one or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

"(4)(A) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (1) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—

Regulations.

"(i) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any entities performing sound recordings affected by this section indicating that a new type of digital audio transmission service on which sound recordings are performed is or is about to become operational; and

"(ii) in the first week of January, 2000 and at 5-year intervals thereafter.

"(B)(i) The procedures specified in paragraph (2) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon the filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

"(I) six months after publication of a notice of the initiation of voluntary negotiation proceedings under paragraph (1) pursuant to a petition under paragraph (4)(A)(i); or

"(II) on July 1, 2000 and at 5-year intervals thereafter.

"(ii) The procedures specified in paragraph (2) shall be concluded in accordance with section 802.

"(5)(A) Any person who wishes to perform a sound recording publicly by means of a nonexempt subscription transmission under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

Regulations.

"(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

"(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

"(B) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

"(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION TRANSMISSIONS.—

"(1) Except in the case of a subscription transmission licensed in accordance with subsection (f) of this section—

"(A) a featured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

"(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

"(2) The copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission shall allocate to recording artists in the following manner its receipts from the statutory licensing of subscription transmission performances of the sound recording in accordance with subsection (f) of this section:

"(A) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

"(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the

American Federation of Television and Radio Artists) who have performed on sound recordings.

"(C) 45 percent of the receipts shall be allocated. on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

"(h) LICENSING TO AFFILIATES.—

"(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6). the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration. then the copyright owner may establish different terms and conditions for such other services.

"(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

"(A) an interactive service; or

"(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

"(i) NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

"(j) DEFINITIONS.—As used in this section, the following terms have the following meanings:

"(1) An 'affiliated entity' is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock.

"(2) A 'broadcast' transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

"(3) A 'digital audio transmission' is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

"(4) An 'interactive service' is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large

does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

"(5) A 'nonsubscription' transmission is any transmission that is not a subscription transmission.

"(6) A 'retransmission' is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as provided in this section, a transmission qualifies as a 'retransmission' only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

"(7) The 'sound recording performance complement' is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

"(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

"(B) 4 different selections of sound recordings—

"(i) by the same featured recording artist; or

"(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

"(8) A 'subscription' transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

"(9) A 'transmission' includes both an initial transmission and a retransmission.".

SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONORECORD DELIVERIES.

Section 115 of title 17, United States Code, is amended—

(1) in subsection (a)(1)—

(A) in the first sentence by striking out "any other person" and inserting in lieu thereof "any other person, including those who make phonorecords or digital phonorecord deliveries,"; and

(B) in the second sentence by inserting before the period ", including by means of a digital phonorecord delivery";

(2) in subsection (c)(2) in the second sentence by inserting "and other than as provided in paragraph (3)," after "For this purpose,";

(3) by redesignating paragraphs (3), (4), and (5) of subsection (c) as paragraphs (4), (5), and (6), respectively, and by inserting after paragraph (2) the following new paragraph:

"(3)(A) A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance of the sound recording under section 106(6) of this title or of any nondramatic musical work embodied therein under section 106(4) of this title. For every digital phonorecord delivery by or under the authority of the compulsory licensee—

"(i) on or before December 31, 1997, the royalty payable by the compulsory licensee shall be the royalty prescribed under paragraph (2) and chapter 8 of this title; and

"(ii) on or after January 1, 1998, the royalty payable by the compulsory licensee shall be the royalty prescribed under subparagraphs (B) through (F) and chapter 8 of this title.

"(B) Notwithstanding any provision of the antitrust laws, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments under this paragraph and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay or receive such royalty payments. Such authority to negotiate the terms and rates of royalty payments includes, but is not limited to, the authority to negotiate the year during which the royalty rates prescribed under subparagraphs (B) through (F) and chapter 8 of this title shall next be determined.

"(C) During the period of June 30, 1996, through December 31, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subparagraph (A) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as the parties may agree. Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may submit to the Librarian of Congress licenses covering such activities. The parties to each negotiation proceeding shall bear their own costs. Federal Register, publication.

"(D) In the absence of license agreements negotiated under subparagraphs (B) and (C), upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph Federal Register, publication.

(E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C). Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider rates and terms under voluntary license agreements negotiated as provided in subparagraphs (B) and (C). The royalty rates payable for a compulsory license for a digital phonorecord delivery under this section shall be established de novo and no precedential effect shall be given to the amount of the royalty payable by a compulsory licensee for digital phonorecord deliveries on or before December 31, 1997. The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.

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"(E)(i) License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress. Subject to clause (ii), the royalty rates determined pursuant to subparagraph (C), (D) or (F) shall be given effect in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under sections 106 (1) and (3) or commits another person to grant a license in that musical work under sections 106 (1) and (3), to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.

"(ii) The second sentence of clause (i) shall not apply to—

"(I) a contract entered into on or before June 22, 1995, and not modified thereafter for the purpose of reducing the royalty rates determined pursuant to subparagraph (C), (D) or (F) or of increasing the number of musical works within the scope of the contract covered by the reduced rates, except if a contract entered into on or before June 22, 1995, is modified thereafter for the purpose of increasing the number of musical works within the scope of the contract, any contrary royalty rates specified in the contract shall be given effect in lieu of royalty rates determined pursuant to subparagraph (C), (D) or (F) for the number of musical works within the scope of the contract as of June 22, 1995; and

"(II) a contract entered into after the date that the sound recording is fixed in a tangible medium of expression

substantially in a form intended for commercial release, if at the time the contract is entered into, the recording artist retains the right to grant licenses as to the musical work under sections 106(1) and 106(3).

"(F) The procedures specified in subparagraphs (C) and (D) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe, in each fifth calendar year after 1997, except to the extent that different years for the repeating and concluding of such proceedings may be determined in accordance with subparagraphs (B) and (C). Regulations.

"(G) Except as provided in section 1002(e) of this title, a digital phonorecord delivery licensed under this paragraph shall be accompanied by the information encoded in the sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

"(H)(i) A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, unless—

"(I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and

"(II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery has obtained a compulsory license under this section or has otherwise been authorized by the copyright owner of the musical work to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each musical work embodied in the sound recording.

"(ii) Any cause of action under this subparagraph shall be in addition to those available to the owner of the copyright in the nondramatic musical work under subsection (c)(6) and section 106(4) and the owner of the copyright in the sound recording under section 106(6).

"(I) The liability of the copyright owner of a sound recording for infringement of the copyright in a nondramatic musical work embodied in the sound recording shall be determined in accordance with applicable law, except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the nondramatic musical work.

"(J) Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, paragraph (6), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.

"(K) Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical

work embodied therein, including by means of a digital transmission, under sections 106(4) and 106(6), (ii) except for compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under sections 106(1) and 106(3), including by means of a digital phonorecord delivery, or (iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

"(L) The provisions of this section concerning digital phonorecord deliveries shall not apply to any exempt transmissions or retransmissions under section 114(d)(1). The exemptions created in section 114(d)(1) do not expand or reduce the rights of copyright owners under section 106 (1) through (5) with respect to such transmissions and retransmissions."; and

(5) by adding after subsection (c) the following:

"(d) DEFINITION.—As used in this section, the following term has the following meaning: A 'digital phonorecord delivery' is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.".

SEC. 5. CONFORMING AMENDMENTS.

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by inserting after the definition of "device", "machine", or "process" the following:

"A 'digital transmission' is a transmission in whole or in part in a digital or other non-analog format.".

(b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS.—Section 111(c)(1) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".

(c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK STATIONS FOR PRIVATE HOME VIEWING.—

(1) Section 119(a)(1) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".

(2) Section 119(a)(2)(A) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".

(d) COPYRIGHT ARBITRATION ROYALTY PANELS.—

(1) Section 801(b)(1) of title 17, United States Code, is amended in the first and second sentences by striking "115" each place it appears and inserting "114, 115,".

(2) Section 802(c) of title 17, United States Code, is amended in the third sentence by striking "section 111, 116, or 119," and inserting "section 111, 114, 116, or 119, any person entitled to a compulsory license under section 114(d), any person entitled to a compulsory license under section 115,".

(3) Section 802(g) of title 17, United States Code, is amended in the third sentence by inserting "114," after "111,".

(4) Section 802(h)(2) of title 17, United States Code, is amended by inserting "114," after "111,".

(5) Section 803(a)(1) of title 17, United States Code, is amended in the first sentence by striking "115" and inserting "114, 115" and by striking "and (4)" and inserting "(4) and (5)".

(6) Section 803(a)(3) of title 17, United States Code, is amended by inserting before the period "or as prescribed in section 115(c)(3)(D)".

(7) Section 803(a) of title 17, United States Code, is amended by inserting after paragraph (4) the following new paragraph:

"(5) With respect to proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 114, the Librarian of Congress shall proceed when and as provided by that section.".

SEC. 6. EFFECTIVE DATE. 17 USC 101 note.

This Act and the amendments made by this Act shall take effect 3 months after the date of enactment of this Act, except that the provisions of sections 114(e) and 114(f) of title 17, United States Code (as added by section 3 of this Act) shall take effect immediately upon the date of enactment of this Act.

Approved November 1, 1995.

LEGISLATIVE HISTORY—S. 227 (H.R. 1506):

HOUSE REPORTS: No. 104-274 accompanying H.R. 1506 (Comm. on the Judiciary).
SENATE REPORTS: No. 104-128 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 141 (1995):
Aug. 8, considered and passed Senate.
Oct. 17, H.R. 1506 and S. 227 considered and passed House.

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is in a language other than English shall be accompanied by an English-language translation, duly verified under oath to be a true translation. Any other party to the proceeding may, in response, submit its own English-language translation, similarly verified.

(d) *Affidavits.* The testimony of each witness in a party's written case, direct or rebuttal, shall be accompanied by an affidavit or a declaration made pursuant to 28 U.S.C. 1746 supporting the testimony.

(e) *Subscription and verification.* (1) The original of all documents filed by any party represented by counsel shall be signed by at least one attorney of record and shall list the attorney's address and telephone number. All copies shall be conformed. Except for English-language translations, written cases, or when otherwise required, documents signed by the attorney for a party need not be verified or accompanied by an affidavit. The signature of an attorney constitutes certification that to the best of his or her knowledge and belief there is good ground to support the document, and that it has not been interposed for purposes of delay.

(2) The original of all documents filed by a party not represented by counsel shall be signed by that party and list that party's address and telephone number.

(3) The original of a document that is not signed, or is signed with the intent to defeat the purpose of this section, may be stricken as sham and false, and the matter shall proceed as though the document had not been filed.

(f) *Service.* The Librarian of Congress shall compile and distribute to those parties who have filed a notice of intent to participate, the official service list of the proceeding, which shall be composed of the names and addresses of the representatives of all the parties to the proceeding. In all filings, a copy shall be served upon counsel of all other parties identified in the service list, or, if the party is unrepresented by counsel, upon the party itself. Proof of service shall accompany the filing. Parties shall notify the Librarian of any change in the name or address to which service shall be made, and shall serve a copy of such notification on all parties and the CARP.

(g) *Oppositions and replies.* Except as otherwise provided in this part or by the Librarian of Congress or a CARP, oppositions to motions shall be filed within seven business days of the filing of the motion, and replies to oppositions shall be filed within five business days of the filing of the opposition. Each party must serve all motions, petitions, objections, oppositions, and replies on the other parties or their counsel by means no slower than overnight express mail on the same day the pleading is filed.

[59 FR 23981, May 9, 1994, as amended at 60 FR 8197, Feb. 13, 1995; 61 FR 63717, Dec. 2, 1996; 65 FR 39820, June 28, 2000]

§ 251.45 Discovery and prehearing motions.

(a) *Request for comment, notice of intention to participate.* In the case of a royalty fee distribution proceeding, the Librarian of Congress shall, after the time period for filing claims, publish in the FEDERAL REGISTER a notice requesting each claimant on the claimant list to negotiate with each other a settlement of their differences, and to comment by a date certain as to the existence of controversies with respect to the royalty funds described in the notice. Such notice shall also establish a date certain by which parties wishing to participate in the proceeding must file with the Librarian a notice of intention to participate. In the case of a rate adjustment proceeding, the Librarian of Congress shall, after receiving a petition for rate adjustment filed under § 251.62, or, in the case of noncommercial educational broadcasting and satellite carrier, prior to the commencement of proceedings, publish in the FEDERAL REGISTER a notice requesting interested parties to comment on the petition for rate adjustment. Such notice shall also establish a date certain by which parties wishing to participate in the proceeding must file with the Librarian a notice of intention to participate.

(b) *Precontroversy discovery, filing of written cases, scheduling.* (1)(i) In the case of a royalty fee distribution proceeding, the Librarian of Congress shall, after the filing of comments and

notices described in paragraph (a) of this section, designate a 45-day period for precontroversy discovery and exchange of documents. The period will begin with the exchange of written direct cases among the parties to the proceeding. Each party to the proceeding must effect actual delivery of a complete copy of its written direct case on each of the other parties to the proceeding no later than the first day of the 45-day period. At any time during the 45-day period, any party to the proceeding may file with the Librarian prehearing motions and objections, including petitions to dispense with formal hearings under § 251.41(b) and objections to arbitrators appearing on the arbitrator list under § 251.4. Responses to motions, petitions, and objections must be filed with the Librarian within seven business days from the filing of such motions, petitions, and objections. Replies to the responses shall be filed within five business days from the filing of such responses with the Librarian. Each party must serve all motions, petitions, objections, oppositions, and replies on the other parties or their counsel by means no slower than overnight express mail on the same day the pleading is filed.

(ii) Subject to § 251.72, the Librarian shall establish, prior to the commencement of the 45-day period, the date on which arbitration proceedings will be initiated.

(2)(i) In the case of a rate adjustment proceeding, the Librarian of Congress shall, after the filing of comments and notices described in paragraph (a) of this section, designate a 45-day period for precontroversy discovery and exchange of documents. The period will begin with the exchange of written direct cases among the parties to the proceeding. Each party to the proceeding must effect actual delivery of a complete copy of its written direct case on each of the other parties to the proceeding no later than the first day of the 45-day period. At any time during the 45-day period, any party to the proceeding may file with the Librarian prehearing motions and objections, including petitions to dispense with formal hearings under § 251.41(b) and objections to arbitrators appearing on the arbitrator list under § 251.4. Responses to motions, petitions, and objections must be filed with the Librarian within seven business days from the filing of such motions, petitions, and objections. Replies to the responses shall be filed within five business days from the filing of such responses with the Librarian. Each party must serve all motions, petitions, objections, oppositions, and replies on the other parties or their counsel by means no slower than overnight express mail on the same day the pleading is filed.

(ii) Subject to § 251.64, the Librarian shall establish, prior to the commencement of the 45-day period, the date on which arbitration proceedings will be initiated.

(c) *Discovery and motions filed with a Copyright Arbitration Royalty Panel.* (1) A Copyright Arbitration Royalty Panel shall designate a period following the filing of written direct and rebuttal cases with it in which parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.

(2) After the filing of written cases with a CARP, any party may file with a CARP objections to any portion of another party's written case on any proper ground including, without limitation, relevance, competency, and failure to provide underlying documents. If an objection is apparent from the face of a written case, that objection must be raised or the party may thereafter be precluded from raising such an objection.

(d) *Amended filings and discovery.* In the case of objections filed with either the Librarian of Congress or a CARP, each party may amend its claim, petition, written case, or direct evidence to respond to the objections raised by other parties, or to the requests of either the Librarian or a panel. Such amendments must be properly filed with the Librarian or the CARP, wherever appropriate, and exchanged with all parties. All parties shall be given a reasonable opportunity to conduct discovery on the amended filings.

[59 FR 23981, May 9, 1994, as amended at 59 FR 63041, Dec. 7, 1994; 61 FR 63718, Dec. 2, 1996]

Avenue, SE, Washington, DC 20540–9112, and a copy of the statements of cost shall be submitted to the Copyright Office as directed in paragraph (c)(2) of this section.

(2) In the case of a rate adjustment proceeding, the statements of cost shall be sent to the CARP Specialist, P.O. Box 70977, Southwest Station, Washington, DC 20024, or hand delivered to the Office of the Copyright General Counsel, Room 403, James Madison Building, 101 Independence Avenue, SE, Washington, DC 20540.

(d) In the case of a rate adjustment proceeding, all parties to the proceeding shall have 30 days from receipt of a proper statement of cost in which to tender payment to the arbitrators, unless otherwise directed by the panel. Payment should be in the form of a money order, check, bank draft, or electronic fund transfer.

(e) In the case of a distribution proceeding, the Library of Congress shall reimburse the arbitrators from the royalty fees collected under title 17 of the United States Code which are the subject of the CARP proceeding. Payment of approved costs shall be made within 30 days of the receipt of a proper statement of cost in the form of an electronic fund transfer in accordance with the regulations of the Library of Congress.

[64 FR 25201, May 11, 1999, as amended at 64 FR 36575, July 7, 1999]

§ 251.55 Post-panel motions.

(a) Any party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination. Such petition shall state the reasons for modification or reversal of the panel's determination, and shall include applicable sections of the party's proposed findings of fact and conclusions of law.

(b) Replies to petitions to modify or set aside shall be filed within 14 days of the filing of such petitions.

§ 251.56 Order of the Librarian of Congress.

(a) After the filing of post-panel motions, see § 251.55, but within 90 days from receipt of the report of the determination of a panel, the Librarian of Congress shall issue an order accepting the panel's determination or substituting the Librarian's own determination. The Librarian shall adopt the determination of the panel unless he or she finds that the determination is arbitrary or contrary to the applicable provisions of 17 U.S.C.

(b) If the Librarian substitutes his or her own determination, the Librarian shall have an additional 30 days to issue the order which shall set forth the reasons for not accepting the panel's determination, and shall set forth the facts which the Librarian found relevant to his or her determination.

(c) The Librarian shall cause a copy of the order to be delivered to all parties participating in the proceeding. The Librarian shall also publish the order, and the determination of the panel, in the FEDERAL REGISTER.

[59 FR 23981, May 9, 1994, as amended at 64 FR 36576, July 7, 1999]

§ 251.57 Effective date of order.

An order of determination issued by the Librarian under § 251.56 shall become effective 30 days following its publication in the FEDERAL REGISTER, unless an appeal has been filed pursuant to § 251.58 and notice of the appeal has been served on all parties to the proceeding.

§ 251.58 Judicial review.

(a) Any order of determination issued by the Librarian of Congress under § 251.55 may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after publication of the order in the FEDERAL REGISTER.

(b) If no appeal is brought within the 30-day period, the order of determination of the Librarian is final, and shall take effect as set forth in the order.

(c) The pendency of any appeal shall not relieve persons obligated to make royalty payments under 17 U.S.C. 111, 112, 114, 115, 116, 118, 119, or 1003, and who would be affected by the determination on appeal, from depositing

ADDENDUM B: ARTICLES

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THE WALL STREET JOURNAL.

Technology

Yahoo Terminates Web Broadcasts

—

Financial, Radio Services Are Halted to Trim Costs, Focus on Profitable Models

By Nick Wingfield and Anna Mathews

06/26/2002
The Wall Street Journal
Page B14

Yahoo Inc., as part of a cost-cutting drive, will shut down money-losing services that broadcast financial news and radio programs over the Internet.

The Sunnyvale, Calif., company said the financial news program, Yahoo FinanceVision, will be shut down today and Yahoo Radio, which plays radio broadcasts from traditional radio stations over the Internet, will be shut down over the next two weeks. A Yahoo executive said the company considered changing the business model for the two services, but decided instead to eliminate them.

"We're trying to focus on things that are profitable for the company or strategic to how we want to build the business going forward," said Henry Sohn, Yahoo 's vice president and general manager of network services. Mr. Sohn said "less than 30" jobs will be eliminated because of the changes.

Yahoo placed a major bet on Web broadcasting at the peak of the Internet frenzy with the $5.7 billion stock acquisition of Broadcast .com Inc., a company that specialized in helping traditional radio stations extend their reach by broadcasting their signals over the Internet. Profits in that business proved elusive though, and Yahoo has increasingly emphasized services for corporations such as broadcasting employee or shareholder meetings over the Internet. Mr. Sohn said Yahoo will continue to operate the corporate broadcasting business, as well as an Internet radio service called LaunchCast that is programmed by Yahoo .

The move by Yahoo comes at a time when online radio is facing serious challenges. The librarian of Congress last week unveiled a royalty rate that online radio stations will have to pay record companies and artists for the music they use. Radio companies have complained that the fee is high enough to force some of them to take their programming off the Web.

Susquehanna Radio Corp., a radio firm based in York, Pa., was told a few weeks ago that Yahoo would stop streaming its 21 stations in July, said Dan Halyburton, senior vice president and general manager of group operations for the closely held company. The broadcaster had a barter deal with the online firm, trading on-air ad time for streaming services.

Now, he said, Susquehanna is "looking at all of our various options" to figure out how, or whether, to keep its stations online. The royalty rate, combined with Yahoo 's decision, "really causes us to pause and look hard at what the future of this is," he said. Yahoo 's Mr. Sohn said the company's decision to shut down Yahoo Radio was unrelated to the new royalty rate.

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Radio And Internet Newsletter

Daily news and commentary on the key issues involving radio and the Internet

June 24, 2002

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RAIN Vendor Guide Ver2.0

Today's previously-scheduled issue of **RAIN**, featuring **RAIN Vendor Guide Ver. 2.0**, has been pushed back a day so that we could bring you the following major story. (Watch for that issue...and please support the fine firms that bring you **RAIN**!)

RAIN exclusive!

Cuban says Yahoo!'s RIAA deal was designed to stifle competition!

BY PAUL MALONEY AND KURT HANSON

The voluntary royalty deal between Yahoo! and the RIAA that the Librarian of Congress announced as his template for the entire industry last week was a deal crafted by Yahoo! to **shut out small webcasters** and **decrease competition**, Broadcast.com founder and Dallas Mavericks owner Mark Cuban revealed to **RAIN** on Friday.

Although he had left the company by the time the deal was signed, Cuban explained in a **"RAIN Reader Feedback"** e-mail, printed in its entirety below, that the deal conceded a high royalty price to avoid a **"percentage-of-revenue"** royalty rate.

By doing this, Cuban explains, he hoped that low-revenue webcasters would be **unable to compete** against the well-funded Yahoo!

Cuban also explains that he wanted a per-stream deal because he intended to use **"multicasting"** technology to serve multiple listeners with a single stream and report only the **initial** streams to the RIAA!

The final deal between Yahoo! and the RIAA was the lone "marketplace deal" upon which the webcast royalty rate was based, both in the CARP recommendation last February and the Librarian of Congress's final decision last Thursday.

YAHOO! broadcast

Cuban sold his network of streaming broadcasters, Broadcast.com, to Yahoo! in August 1999, for a reported $5.7 billion.

The thinking behind the deal structure, Cuban explains below, was that smaller webcasters, who would be unable to afford to webcast on their own under such terms (because of the fixed rates), would be compelled to use the services of well-funded aggregators like the Yahoo! Broadcast service.

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IMPORTANT NOTE: The villian in this story is not Yahoo! (They were simply being savvy businesspeople!) The villian is the CARP process by which this anti-broadcaster, anti-small-webcaster deal became the template for the industry! (See "RAIN Analysis" below.) – KH

Cuban's e-mail to **RAIN** follows in its entirety.

Reader feedback

"As Broadcast.com, I didn't want percent-of-revenue pricing"

It's very interesting that they built this on the Yahoo!/RIAA deal.

When I was still there (the final deal was signed after I left Yahoo!), I hated the price points and explained why they were too high. HOWEVER, I was trying to get concession points from the RIAA. Among those was that I, as Broadcast.com, **didn't want percent-of-revenue** pricing.

Why? Because it meant every "Tom , Dick, and Harry" webcaster could come in and undercut our pricing because we had revenue and they didn't. Broadcasters could run ads for free and try to make it up in other areas so they wouldn't have to pay royalties.

As an extension to that, I also wanted there to be an **advantage to aggregators.** If there was a charge per song, it's obvious lots of webcasters couldn't afford to stay in business on their own. THEREFORE, they would have to come to Broadcast.com to use our services because with our aggregate audience, if the price per song was reasonable, we could afford to pay the royalty AND get paid by the webradio stations needing to webcast.

More importantly -- and of course I didn't tell the RIAA this -- we had a big **multicast** network (remember multicasting? Yahoo! didn't seem to after I left). Well, multicasting only sends a single stream from our server, so that is what we would record in our reports for the RIAA, and that is what we would pay on.

So that was the logic going into the Yahoo!/RIAA deal. I wasn't there when it was signed, but I'm guessing and I've been told that there weren't dramatic changes.

Now, no one asked me any of these things prior, during, or after the first or second pricing. I'm not sure that this matters. But if it does, here it is: The Yahoo! deal I worked on, if it resembles the deal the CARP ruling was built on, was designed so that there would be **less competition**, and so that small webcasters who needed to live off of a "percentage-of-revenue" to survive, **couldn't.**

There you have it, if anyone cares.

Mark Cuban
Dallas Mavericks

...

...

This e-mail reveals more clearly than anything else to date the complete breakdown in the U.S. Copyright Office's royalty-setting process for Internet radio.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2004, I caused copies of the foregoing FINAL Brief for Participant Licensee Petitioners Salem Communications Corp., the National Religious Broadcasters Music License Committee, and Live365, Inc. to be served first class U.S. mail, to the following:

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Dineen Pashoukos Wasylik

The Yahoo Agreement

As part of its overall strategy, RIAA set out to negotiate an agreement with Yahoo, one of the parties RIAA considered to be a major player in making sound recording transmissions. *See, e.g.* Tr. 559 (Rosen) (J.A.____); Report 68 n. 47 (J.A.____).

Yahoo was unique among streaming services, both with respect to its success and its business model. [[Yahoo's entire business centered on the Internet, where it operated as a "portal," providing a variety of content and services.]] Mandelbrot W.R.T. 1-2 (J.A.____). [[Its streaming operation centered on its role as an "aggregator," for the content of others, including, primarily, 400 radio broadcast stations.]] *Id.* at 2 (J.A.____). [[When it made its deal with RIAA, approximately 90% of its sound recording performances were from radio station retransmissions.]] *Id.* at 3 (J.A.____).

Everyone recognized that Yahoo would be a major player in any arbitration and would bear substantial costs. Report 68 (J.A.____). The Panel found that "[n]aturally, Yahoo! was willing to accept inflated royalty rates if it could realize an even greater saving in arbitration costs." *Id.* [[Material Identified as Confidential by RIAA----------]] (RIAA_Exh._137_DR_at_RIAA_N1009) (J.A.____).

In fact, the undisputed testimony was that Yahoo assessed the fees payable under an agreement with RIAA using a simple calculus:

> [[[o]n the [one] side we just looked at what we would have paid under the agreement. On the other side we had what we would have ended up paying following this arbitration, plus the litigation costs, plus the opportunity costs.]]

Id. at 11,270-71 (J.A.____). [[Mr. Mandelbrot explained that, "litigation costs" were the expected outside costs, and "opportunity costs" denoted internal disruption and loss of management time and attention caused by litigation.]] *Id.* [[Yahoo expected it to cost "over a million dollars to participate in this arbitration," with expected "opportunity costs" to exceed an additional million dollars.]] *Id.* at 11,274 (J.A.____). [[As he explained, "At the time that we entered into this agreement, we had a dramatically growing business. And it just felt like to try to -- to have people here in this arbitration rather than going out and building our business would have potentially been an enormous cost to us."]] *Id.* at 11,273-74 (J.A.____).

[[He further testified that, from October 28, 1998, through August 2001, Yahoo had spent $1.97 million in fees under the agreement.]] The following exchange summed up the essence of Yahoo's decision to make a deal with RIAA:

> [[THE WITNESS: Sorry to interrupt, Your Honor. But to sort of clarify this, as I said, so far we've paid 1.97 million for the royalties under our agreement. And if we estimate the opportunity costs at over a million dollars and the legal costs at over a million dollars, unless this panel were to decide that the music companies should actually be paying us to do the broadcasting --
>
> ARBITRATOR VON KANN: You'd have to get a negative royalty.
>
> THE WITNESS: Exactly.]]

Id. Tr. 11,294-95 (J.A.____). [[Yahoo elected not to renew the agreement after December 31, 2001]]. Tr. 14,717-18 (J.A.____). [[Thus, the total payments Yahoo made under the agreement were approximately equal to the cost savings Yahoo expected to realize by making the deal and avoiding this proceeding.]] In other words, the Yahoo agreement was not

indicative of the value of the performance right. Rather, it was, at most, indicative of [[the value of avoiding the costly CARP process.]][1]

The Yahoo agreement required payment of a lump sum equal to $1.25 million for the first 1.5 billion performances. After that, the agreement set a fee of 0.2 cent per Internet-only performance and a fee of 0.05 cent per radio retransmission performance. Librarian's Order 45,251 (J.A.____). An ephemeral recording fee of about [[$50,000]] per year was also added. Report 61-63. [[The initial term of the agreement was October 28, 1998 through December 31, 2000, with two one-year options to renew.]] *Id.* at 62 (J.A.____).[2]

Yahoo concluded, in its business judgment, that [[it could not pass along the .05 cent per performance radio retransmission fee to radio stations whose programming it was retransmitting.]]

> [[[W]e've not passed any of these fees along to the radio stations because we have every interest in keeping those stations signed up with us. So we've made the business decision that it made more sense for us to actually stomach these fees than to try to pass them on to our radio station partners because we're afraid that if we tried to do that, they would terminate their agreements with us.]]

Tr. 11,429 (Mandelbrot) (J.A.____).

> [[Q. I just want to be clear that I understood. Yahoo!'s judgment is that if it passed along to the radio stations the radio station retransmission rate that it has negotiated, a lot of those stations would just pull the plug. Is that right?

---

[1] Yahoo obtained other benefits from the deal that did not reflect the value of the sound recording performance right, [[including certainty for Yahoo and its customers, record label goodwill to facilitate licensing for on-demand services, Mandelbrot W.R.T. 3-4 (J.A.____), a partial Most Favored Nations clause, Report 67-68 (J.A.____), and a flat fee of $5,000 per year to cover performances on all streams of talk-based stations retransmitted by Yahoo, Mandelbrot W.R.T. 5-6; Tr. 11,388-89 (Mandelbrot) (J.A.____).]]

[2] [[The agreement prohibited Yahoo from "cooperating with any party opposing RIAA in the CARP" but permitted RIAA to use the agreement in the CARP proceeding."]] Report 63 (J.A.____).

A. That is correct, yes.]]

Id. at 11,430 (J.A.____).

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Re: Beethoven.com LLC, et al. v. Librarian of Congress,
Nos. 02-1244, 02-1246, 02-1247, 02-1248, 02-1249 (D.C. Cir.)

Dear Parties:

We are writing to inform you that, pursuant to Paragraph 12 of the Protective Order dated March 29, 2001 that governed the underlying CARP proceeding, we have sought and obtained permission from counsel to Yahoo!, Inc. to make use of the materials highlighted in the attached document in our reply briefing without the need to designate the information as "Protected Material." We are informing you so that "the other Reviewing Parties authorized to examine the same may make use of the Protected Materials in the same manner" as per the Protective Order.

Sincerely,

Bruce G. Joseph

cc: Seth Greenstein